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United States' Use of Economic Sanctions, Treaty Bending, and Treaty Breaking in International Aviation

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UNITED STATES' USE OF ECONOMIC SANCTIONS, TREATY BENDING, AND TREATY BREAKING IN INTERNATIONAL AVIATION

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I. OVERVIEW

OVER THE LAST century, States have repeatedly used coercive forms of economic power to force other States in the world community to change their modes of behavior as a response to perceived or real transgressions of international norms and laws. Perhaps one of the most striking examples of the use of punitive economic sanctions[1] came after World War I. The Treaty of Versailles has long been viewed as harsh retribution for Germany's

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[1] Economic sanctions are "intended to prevent, regulate or otherwise hinder economic activity with another nation for the purpose of condemning or influencing the latter's actions or policies." Homer E. Moyer & Linda A. Mabry, *Export Controls as Instruments of Foreign Policy: The History, Legal Issues and Policy Lessons of Three Recent Cases*, 15 LAW & POL'Y INT'L BUS. 1, 2 n.1 (1987). The basis for sanctions generally is to reduce political association with an aggressor or oppressor State and to alter an economic relationship to increase support for victims and decrease support for a perceived oppressor. Goler T. Butcher, *The Unique Nature of Sanctions Against South Africa, and Resulting Enforcement Issues*, 19 N.Y.U. J. INT'L L. & POL. 821, 840-41 (1987); *see also* John F. Cooke, Comment, *The United States 1986 Emergency Economic Sanctions Against Libya - Have They Worked?*, 14 MD. J. INT'L L. & TRADE 195, 196 (1990); Jeffrey P. Bialos & Kenneth I. Juster, *The Libyan Sanctions: A Rational Response to State Sponsored Terrorism?*, 26 VA. J. INT'L L. 799, 839-55 (1986) (discussing the legitimacy of using economic sanctions as a response to State sponsored terrorism); Kenneth W. Abbott, *Coercion and Communication: Frameworks for Evaluation of Economic Sanctions*, 19 N.Y.U. J. INT'L L. & POL. 781 (1987) (discussing the effectiveness of economic sanctions).

role in the war.[2] Indeed, many say that the fallout from that treaty contributed to the calamitous rise of Adolf Hitler, who galvanized German resentment to its harsh terms as a means of furthering his own frightening agenda.[3]

The United States has not been afraid to use economic sanctions to attempt to achieve a variety of legal and policy objectives. Over the last two years alone, for example, the United States has invoked sanctions, including air and travel related bans, against Iraq, Serbia (Yugoslavia), and Haiti, designed in part to force their governments to change certain behavior.[4]

The purpose of this article, however, is not to undertake a general review of the widespread use of economic sanctions by the world community or even by the United States. Rather, it is to take a closer look at the use of a variety of sanctions employed by the United States in the international aviation arena.

The United States has time and time again resorted to a cutoff of air links in instances where trading partners have done something perceived as offensive to U.S. interests. This historical review questions the reason for this response. As should be evident from the analysis that follows, the answer is not always consistent, logical, or satisfying. The United States cutoff of aviation links as a sanction is presumably deemed potent because it under-

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[2] *See, e.g.*, ANTHONY READ & DAVID FISHER, THE DEADLY EMBRACE 14 (1988). One commentator cites sanctions imposed by the League of Nations against Italy for its invasion of Ethiopia in the 1930's as the first example of the modern use of economic sanctions. D.G.M. Fourie, *Trade Sanctions: A South African Perspective*, 19 N.Y.U. J. INT'L L. & POL. 921, 921 (1987). The Covenant of the League obliged members to use economic sanctions in retaliation for acts of war. Moyer & Mabry, *supra* note 1, at 3.

[3] READ & FISHER, *supra* note 2, at 17-18.

[4] *See, e.g.*, Exec. Order No. 12,722, 55 Fed. Reg. 31,803 (1990) (blocking Iraqi property and prohibiting certain transactions with Iraq); *DOT to Set Yugoslavia Embargo*, TRAVEL WKLY., June 15, 1992, at 1; 138 CONG. REC. S7089-02 (1992); 138 CONG. REC. S5991-01 (1992) (congressional statements regarding possible sanctions against Serbia); Exec. Order No. 12,775, 56 Fed. Reg. 50,641 (1991) (prohibiting specified transactions with Haiti); *Recap of Transportation Dept. Overseas Air Travel Sanctions*, TRAVEL WKLY., June 14, 1993, at 65.

mines the basic goals States generally have in promoting development of their aviation sector: 1) States have a flag airline as a symbol of prestige, success, and power in an industrialized world; 2) For many developing countries, flag carriers play a critical role in advancing commercial, tourism, and cultural ties with other countries; 3) Flag carriers provide important diplomatic shuttling functions; and 4) In many cases flag carriers provide a critical source of hard currency. For these reasons, as well as others, denying a State's airline its traditional or bargained-for service to the United States, or the ability to have its tickets issued in the United States, can be a serious blow for a country, particularly where other nations follow suit.

This article is divided into two major parts. Part II traces some of the more notable instances where the United States has invoked economic sanctions and/or repudiated bilateral agreement treaty obligations in the aviation arena. Part III analyzes the propriety of U.S. actions under international law. It is notable that many U.S. sanctions in the aviation sector were invoked during the Cold War and were directed against eastern bloc countries. If these were the only examples of U.S. use of aviation sanctions, then this would be merely an article about passing historical trends. The widespread use of economic sanctions in the aviation sector over the last few years suggests, however, that the United States intends to employ them on a continuing basis.[5]

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[5] In 1992, the United States imposed aviation sanctions against the former Yugoslavia at the behest of the State Department. In May of 1992, DOT denied the applications of JAT for renewal of its foreign air carrier permit and exemption authority to serve the United States with scheduled and charter flights. Applications of Jugoslavenski Aerotransport, C.A.B. Order No. 92-5-38 (1992). The basis for this action was a letter from Secretary of State Baker to the DOT, requesting immediate termination of JAT's landing rights due to "Yugoslavia's failure to guarantee the reopening of Sarajevo airport [for] . . . humanitarian relief flights and failure to guarantee the withdrawal of Serbian military forces from the airport and surrounding hills." *Id.* at 3. At the time of the U.S. action, the Yugoslav-United States bilateral agreement had expired by its terms. *Id.* at 2.

Subsequently, the DOT issued sweeping Yugoslav travel and aviation related prohibitions on the basis of an Executive Order from President Bush in June of 1992. *See In re* Suspension of Air Operations Between the United States and Yu-

II. HISTORICAL REVIEW

A. THE USSR

The United States and the USSR signed a bilateral aviation agreement in November of 1966. [6] That agreement provided in its Route Annex for each country to designate an airline to provide nonstop service on a New York-Moscow routing.[7] Article 2 of the agreement provided that service between the two countries would commence following an exchange of diplomatic notes.[8] Article 5 specified the circumstances for revocation of the right to operate the agreed services:

1) substantial ownership/control of the designated carriers not vested in nationals or agencies of the respective party;
2) failure to follow the laws of the host country; or
3) failure to perform under the agreement.[9]

This article also included a consultation clause.[10]

Article 13 of the agreement is rather curious. It provided for suspension of operating rights for *both* countries' airlines "upon thirty days' notice" where the "designated airline is prevented from operating flights on the agreed services because of circumstances beyond the control of the first Contracting Party."[11] The article then provides a right of immediate service suspension under "extraordinary circumstances . . . beyond the control . . . of that [c]ontracting [p]arty."[12] While the intent of the parties as to what this article was intended to cover is not clear, what is clear is that these provisions did not openly

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goslavia, Serbia and Montenegro, C.A.B. Order No. 92-6-12 (June 9, 1992). The DOT Final Order precluded, *inter alia*, sale of tickets and issuance of airway bills to or from Yugoslavia by United States carriers anywhere in the world and by foreign carriers in the United States. *Id.* at 2-3.

[6] Civil Air Transport Agreement, Nov. 4, 1966, U.S.-U.S.S.R., T.I.A.S. No. 6135, at 1909.

[7] *Id.* at 1918.

[8] *Id.* at 1910.

[9] *Id.* at 1910-11.

[10] *Id.* at 1911.

[11] *Id.* at 1914.

[12] *Id.*

allow for suspension of service on political grounds. Article 17 of the agreement does, however, provided for termination six months after either side gave notice of such intent.[13]

On July 8, 1968, diplomatic notes were finally exchanged to commence services. Pan Am was designated as the United States carrier and Aeroflot, not surprisingly, was designated to fly the Soviet flag across the Atlantic.[14] This exchange had been preceded by another exchange of notes in May 1968, designed to alter the Route Annex and give both countries the right to make intermediate technical stops on the route.[15]

By 1973, relations between the United States and the USSR had warmed to the point where expansion of service was agreed upon. A June 1973 proposal providing for, *inter alia*, expansion of route authority for Pan Am to Leningrad and for Aeroflot to Washington, D.C. was approved.[16] Increased frequencies of service were also stipulated. But while these were positive signs, the protocol memorializing the new service laid the seeds for future curtailment of service between these countries. The route annex that outlined the new service[17] governed operations only through March 31, 1975 and "thereafter such number of flights as is subsequently agreed between the Contracting Parties."[18] Thus, absent further agreement, air service between the two countries would end on April 1, 1975.

Following implementation of the protocol, Aeroflot sought CAB permission to undertake charter flights to the

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[13] *Id.* at 1916.

[14] Exchange of Notes Between the American Embassy and the Ministry of Foreign Affairs of the USSR, July 8, 1968, T.I.A.S. No. 6560, at 6020.

[15] Exchange of Notes Between the American Embassy and the Ministry of Foreign Affairs of the USSR, May 6, 1968, T.I.A.S. No. 6489, at 4849.

[16] Protocol Between the U.S. and USSR on Questions Relating to the Expansion of Air Services, June 23, 1973, T.I.A.S. No. 7658, at 1508.

[17] *Id.* at 1508, 1510-11.

[18] *Id.* at 1510.

United States.[19] Because the bilateral agreement did not address charter services, commencement of such service was "dependent upon general principles of reciprocity and comity between nations."[20] The CAB administrative law judge who reviewed Aeroflot's application recommended amendment of the carrier's permit to allow charter operations.[21] The CAB subsequently adopted the administrative law judge's recommendation.[22]

Subsequent agreements between the United States and the USSR in early and late 1975 served to further extend and expand scheduled route service through October 1976.[23] While the basis, if any, under which air services continued between the two countries from October 1976 until March 1978 is not clear, some informal arrangement was almost certainly in effect. A review of treaty history reveals, however, that no further agreements between the two countries were recorded until 1978. In March 1978, the parties did formally agree to air service arrangements through March 31, 1979.[24] That agreement, *inter alia*, reaffirmed the existing relationship between Aeroflot and Pan Am that designated each carrier as the other's general sales agent in its home country.[25] This relationship had been a cornerstone of the service provided by the two carriers from the time that the original bilateral agreement was implemented.[26] The "General Sales Agency Agreement" between the two carriers not only mandated exclusive reciprocal ticket sales, but provided for reciprocal

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[19] General Dep't of Int'l Air Servs. (Aeroflot Soviet Airlines), C.A.B. Docket No. 25,862 (1974).

[20] *Id.* at 1.

[21] *Id.* at 5.

[22] General Dep't of Int'l Servs. (Aeroflot Soviet Airlines), C.A.B. Order No. 74-3-137, at 1 (1974).

[23] Exchange of Notes Between the Soviet Foreign Ministry and the American Embassy, Dec. 9, 1974 and Apr. 16, 1975, T.I.A.S. No. 8058, at 562-63; Exchange of Notes Between the Soviet Foreign Ministry and the American Embassy, Dec. 4 and Dec. 22, 1975, T.I.A.S. No. 8217, at 3855.

[24] Exchange of Notes Between the Department of State and the Soviet Embassy, Mar. 3, 1978, T.I.A.S. No. 8996, at 3056-57.

[25] *Id.*

[26] Aeroflot, C.A.B. Order No. 80-5-18, at 1-2 (1980).

ground handling as well.[27]

Following expiration in March 1979 of the air service arrangements negotiated in 1978, Aeroflot apparently continued to provide service to the United States under CAB exemption authority.[28] That service was subsequently affected by dramatic world events. In response to the December 1979 invasion of Afghanistan by the Soviets, the United States imposed a variety of economic sanctions against the USSR,[29] including what must be considered relatively light sanctions in the aviation area. Specifically, in early January 1980, the CAB ordered Aeroflot to reduce the number of weekly roundtrips between Moscow and N.Y./Washington, D.C. from three to two.[30] The basis for the Board's action was a State Department letter that cited unspecified "foreign policy considerations" that made it in the "national interest" to reduce Aeroflot's ability to service the United States.[31] The Board concluded, in light of the State Department's request, that the public interest warranted the requested reduction.[32]

Although information currently available from the Department of Transportation does not make it clear, Aeroflot's apparent response to the CAB order to reduce scheduled frequencies was to substitute charter flights to accommodate travelers. Aeroflot's permit allowed it to perform "an unlimited number of on-route charters without any requirement for advance approval" by the CAB.[33] Three months after curtailing scheduled Aeroflot service, the CAB, again in response to a request from the State Department, acted to gain greater control over Aeroflot's charter scheduling.[34] Citing in part "foreign policy con-

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[27] *Id.*

[28] Aeroflot, C.A.B. Order No. 80-1-43, at 1 n.1 (1980).

[29] Moyer & Mabry, *supra* note 1, at 29.

[30] C.A.B. Order No. 80-1-43, *supra* note 28, at 2.

[31] *Id.*

[32] *Id.*

[33] Aeroflot, C.A.B. Order No. 80-3-23, at 1 (1980).

[34] *Id.*

clusions" reached by the State Department, the CAB ordered Aeroflot to obtain advance approval from the Director of the Bureau of International Aviation for each charter flight and for any extra sections of scheduled service beyond the two roundtrips per week previously authorized.[35]

Later in 1980, Aeroflot sought exemption authority from the CAB to allow it to provide its own ticket sales and ground handling services in the United States.[36] Coming on the heels of the Soviet invasion of Afghanistan, Aeroflot's request was politically indelicate. The application was, however, prompted by Pan Am's suspension of service to the Soviet Union and an acknowledgment that Pan Am could "no longer perform the sales and other agency services provided for in the [agency] agreement."[37] In a show of good faith, and with a recognition that without action, the United States could be left without any service to the Soviet Union, the CAB granted Aeroflot's temporary exemption request.[38] What is noteworthy is that by the time the Board had acted on Aeroflot's request, the bilateral agreement between the two countries had lapsed "on the assumption that a mutually acceptable pattern of service between the countries would be established in further negotiations."[39] But in fact, these negotiations never occurred.[40] At least in the CAB's view, Aeroflot's flights to the United States after March 1979 were conducted entirely "at the discretion of the United States government."[41] This reality would ulti-

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[35] *Id.* at 2.

[36] Aeroflot, C.A.B. Order No. 80-5-18, at 2 (1980).

[37] *Id.* The CAB order granting the exemption sought by Aeroflot noted that:

> The need for the Pan American-Aeroflot agreement stems from the fact that the Soviet Union requires Pan American to use Aeroflot for all sales, reservations . . . etc. in that country. [T]he Board has previously concluded that the consumer would be served best by imposing a reciprocal agency relationship. . . .

Id.

[38] *Id.* at 2-3.

[39] Aeroflot, C.A.B. Order No. 81-12-178, at 1 (1981).

[40] *Id.*

[41] *Id.*

mately contribute to the decision by the CAB under a new U.S. President, faced with a political crisis in Poland, to terminate Aeroflot's U.S. landing rights *in toto*.

In late December 1981, President Ronald Reagan caused transmission of a letter from the State Department to the CAB asking the CAB to bar any further flights of Aeroflot between the Soviet Union and the United States.[42] The letter explained that:

> President Reagan has decided for foreign policy reasons that the designated Soviet airline Aeroflot should not be permitted to operate further services to or from the United States. This decision was made in response to Soviet involvement in the imposition of martial law in Poland and the repression of the Polish people. This decision has been communicated to the Soviet Government . . . . The Department considers that such action would not conflict with the US-USSR Civil Air Transport Agreement, as amended.[43]

Citing statutory authority mandating both a "public interest" rationale for altering a foreign air carrier permit status and "foreign policy and defense needs of the United States," the CAB tentatively withdrew Aeroflot's operating privileges. The CAB explained that "[i]n reaching this conclusion, we share the State Department's assessment that the curtailment of Aeroflot's service to the United States does not conflict with our aviation agreement with the Soviet Union, especially since there is presently no guaranteed level of service under the agreement."[44] The CAB order was finalized after no responses were received from any interested party to the show cause order issued in conjunction with its tentative decision.[45] The expansion of air service between the two countries that had attended the thaw of the Cold War during the 1970s screeched to a halt. Two years later, the

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[42] *Id.* at 2.

[43] *Id.*

[44] *Id.*

[45] Aeroflot, C.A.B. Order No. 82-1-6 (1982).

United States would completely eviscerate its aviation relations with the USSR.

On September 1, 1983, a Soviet Air Force Unit shot down Korean Airlines Flight 007.[46] In response, President Reagan requested the CAB to take additional actions against Aeroflot, including:

- reaffirming suspension of its operating rights,
- barring its right to sell air services in the United States,
- precluding carriage of traffic by United States carriers where Aeroflot was on the itinerary, and
- precluding U.S. carriers from accepting tickets or shipping documents issued by Aeroflot.[47]

Not surprisingly, the CAB, despite recognition that "these actions could create hardship for travelers and shippers and could deprive U.S. airlines and travel agents of revenues," acceded to the President's desires in a tentative decision issued on the same day as his request.[48] This tentative decision was finalized on September 12, 1983.[49] Aeroflot was not to recommence service to the United States until 1986.

B. POLAND

The 1972 Polish bilateral agreement[50] was, in certain respects, more generous to the Poles than its Soviet counterpart was to the Soviets. Article 3 of the Polish bilateral agreement provided each country with the right to designate its carrier of choice to serve the routes described in a separate schedule.[51] Under article 5 of the bilateral agreement, once each contracting party had granted regu-

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[46] Letter from Ronald Reagan, President of the United States, to Dan McKinnon, Chairman, C.A.B. (Sept. 8, 1983).

[47] *Id.* at 1.

[48] Soviet Attack on Korean Airlines Flight 007, C.A.B. Order No. 83-9-43, at 3 (1983).

[49] Soviet Attack on Korean Airlines Flight 007, C.A.B. Order No. 83-9-58 (1983).

[50] Air Transport Agreement, July 19, 1972, U.S.-Polish People's Republic, T.I.A.S. No. 7535.

[51] *Id.* at 4270.

latory assent to service startup, operating permission could only be revoked under specified situations:

1) failure to qualify under the laws and regulations of the other contracting party,
2) failure to follow normal aircraft operating procedures in force in the other party's territory, or
3) ownership/control no longer vested in the contracting party or its nationals.[52]

Article 5 also precluded immediate suspension of service pending consultations except under the most narrow of circumstances.[53]

Article 9 of the Polish bilateral agreement represented generous capacity requirements in that it placed no restrictions on the number of flights or the size of aircraft that could be flown on designated routes.[54] In contrast to the Soviet bilateral agreement, provisions in the Polish counterpart permitted ticket sales outside of the designated carrier's host countries. Furthermore, there was no requirement for a reciprocal general sales agency relationship.[55] The Polish bilateral agreement was noteworthy as well for its inclusion of an arbitration clause and a one-year wind-down period to follow notice of termination by either party.[56]

In 1976, the Polish bilateral agreement was amended in fairly dramatic ways. The amendments were necessitated, in large part, because Poland was unable or unwilling to implement that part of article II of the Polish bilateral agreement. This part of the agreement afforded the U.S.-designated carrier the right to sell air transportation in Poland for Polish currency and by implication required the Polish government to convert that currency into dollars. These "Supplementary Understandings," contained in an exchange of notes between the American Ambassa-

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[52] *Id.* at 4271.
[53] *Id.* art. 4(B).
[54] *Id.* art. 9(E).
[55] *Id.* art. 11(B).
[56] *Id.* arts. 13 and 15.

dor to Poland and the Polish First Deputy Minister of Transport, indicated that while the U.S. airline would enjoy the right to sell transportation within Poland for freely convertible currency, all sales of transportation in Poland for Polish currency would have to be made by the designated airline of Poland, LOT,[57] acting as general sales agent. But unlike Aeroflot, LOT was not required to sell its tickets in the United States through Pan Am, the designated airline of the United States.

As a *quid pro quo* for the United States to agree to this scheme, Poland agreed to sell through LOT not less than the equivalent of $4.5 million in air services for Pan Am in Polish currency.[58] In addition, despite the laudatory open capacity language of the original bilateral agreement, the exchange of notes included a specific limitation on flight frequencies and the number of seats permitted to be made available on flights for the period of November 1, 1976 to October 14, 1977.[59] Finally, the exchange of notes contained a rather curious series of paragraphs concerning consultation requirements:

> In the event the Polish authorities cannot fulfill the guaranteed level of sales provided . . . above, or if either country believes that a fundamental change of circumstances has occurred, prompt consultations would be held, at the request of either country, to make appropriate adjustments in these supplementary understandings. If agreement on such adjustments cannot be reached within 60 days from the commencement of consultations, [the bilateral agreement] shall thereupon be deemed to have been amended to reduce the frequency levels to 3 roundtrip flights per week for each airline.[60]

The exchange of notes concluded with an agreement that consultations would be held prior to April 30, 1979. If no consensus to amend the agreement was reached at that

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[57] Exchange of Notes Between the American Ambassador and the Polish First Deputy Minister of Transport, Aug. 26, 1976, T.I.A.S. No. 8469, at 243-44.

[58] *Id.* at 244.

[59] *Id.* at 245-46.

[60] *Id.* at 247.

time, the bilateral agreement between the two countries would "automatically terminate on October 14, 1979."[61]

Approximately one year after entering into the air transport agreement, Pan Am and LOT apparently proposed introduction of dramatically lower fares.[62] In response, the American ambassador indicated to his Polish counterpart that he was concerned by the "possibility . . . that these experimental fares, once introduced, could become permanent even though they might later prove to have a disruptive effect on the market."[63] Both countries agreed that the experimental fares would remain in effect only through the spring of 1978 and would be subject to renegotiation at that time.[64] In acceding to this limiting request by the United States, the Polish Ministry of Foreign Affairs also insisted that "consultations be carried out as soon as possible regarding the unresolved air transport problems between the Polish Peoples Republic and the United States of America."[65] No explanation was offered as to what precisely these "problems" were that required resolution in the minds of the Poles. In an exchange of notes in the summer of 1978, the United States and Poland merely agreed to certain revisions and extensions of the existing amended bilateral agreement.[66] The most significant new provision shortened the termination date to December 31, 1978.[67]

In late December 1978, new provisions to the expiring bilateral agreement were negotiated.[68] Highlights of the new agreement included:

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[61] *Id.*

[62] Exchange of Notes Between the American Ambassador and the Polish Ministry of Foreign Affairs, Dec. 13 and 16, 1977, T.I.A.S. No. 9042, at 3887.

[63] *Id.*

[64] *Id.* at 3887-88.

[65] *Id.* at 3890.

[66] Exchange of Notes Between the American Embassy and the Polish Ministry of Foreign Affairs, June 19 and Aug. 11, 1978, T.I.A.S. No. 9192.

[67] *Id.* at 241.

[68] Exchange of Notes Between the American Embassy and the Polish Ministry of Foreign Affairs, Dec. 29, 1978 and Jan. 15 and 30, 1979, T.I.A.S. No. 9225.

- a liberal pricing regime,[69]
- a new financial structure to govern guaranteed sales by the Polish-designated airline on behalf of the U.S.-designated airline,
- expansion of charter service, and
- a change of gauge provisions.[70]

These broadbrush amendments to the original bilateral agreement also set out a new termination clause:

> The foregoing understandings and any other necessary matters will be reviewed in consultations at any time, at the request of either Party, and in any event during the latter part of 1981. If agreement on continuation, amendment or recision of these understandings is not reached by March 31, 1982, the Agreement will terminate on that date.[71]

Ultimately, the Poles did not get the full benefit of their bargain with the United States — for reasons completely unrelated to the aviation relationship between the two countries. During the years subsequent to the implementation of the newly amended bilateral agreement, Poland faced serious economic and political problems. Eventually, the Polish Party Central Committee replaced its party chairman with General Wojciech Jaruzelski, who had served as President and Defense Minister. Jaruzelski was given broad domestic authority to restore Poland's tottering economy.[72] As the situation in Poland continued to deteriorate, and the Soviets conducted threatening military exercises around the country,[73] Jaruzelski "issued a martial law decree drastically restricting civil rights . . . [in which] [t]he government banned public gatherings and demonstrations" and made widespread arrests.[74] The country's emerging free labor movement, Solidarity, was

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[69] *Id.* at 908-10.

[70] *Id.* at 910-12.

[71] *Id.*

[72] Moyer & Mabry, *supra* note 1, at 63.

[73] *Id.* at 62.

[74] *Id.* at 64.

ordered shut down.[75]

The response of western European leaders, and President Reagan, was viewed by some as tepid: "[w]hile ordinary people in the West reacted quickly and angrily to the crackdown in Poland, their governments responded at first with an abundance — some said an overabundance — of caution."[76] Apparently there was some confusion within the U.S. government as to whether Jaruzelski's actions came at the behest of the Soviet Union or sought merely to head off Soviet intervention.[77] Imposition of martial law by Polish military leaders came at a time when the country was facing:

> an economic crisis of almost unimaginable proportions. The problems extend[ed] beyond food shortage and strikes, and involve[d] more than cynical hoarding in a monetary system that [wa]s in complete disarray. Above all, Poland's shredded economy [wa]s the result of social disintegration, the product of sullen workers confronting an alien state.[78]

In response to the declaration of martial law in Poland, President Reagan, during a speech on December 23, 1981, declared his intention to suspend aviation relations between Poland and the United States.[79] Shortly thereafter, the State Department advised the CAB that the President had decided to suspend LOT's operating rights in the United States effective immediately. Additionally, the current bilateral agreement was to be considered suspended until further notice.[80] The CAB, in concurrence with the President's action, issued a show cause order inquiring why a tentative order suspending LOT's operating rights should not be made final two days later.[81]

In its necessarily hurried response to the order, LOT

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[75] *Id.* at 60.
[76] *World Reaction: Semi-Tough*, NEWSWEEK, Dec. 28, 1981, at 19.
[77] *Id.*
[78] *Poland's Ordeal: Troops Can't Fix the Economy*, NEWSWEEK, Dec. 28, 1981, at 22.
[79] Polskie Linie Lotnicze (LOT), C.A.B. Order No. 81-12-155, at 1 (1981).
[80] *Id.*
[81] *Id.* at 1-2.

suggested that the President's decision was "unlawful and inconsistent with the United States/Poland Bilateral agreement Air Transport Services Agreement."[82] LOT contended that the President had not taken any legally cognizable action to effectively suspend the United States/Poland bilateral agreement.[83] The CAB pointed out, however, that the State Department in fact had advised it to the contrary. Furthermore, the CAB stated that it felt "constrained to follow the advice of the State Department, considering its responsibility and expertise with regard to that issue."[84]

LOT also argued that the bilateral agreement, as amended, was effective through March 31, 1982, a date that could not be accelerated due to the requirement of a one year notification of termination.[85] Without citing to any authority, the CAB explained that:

> Obviously, the President's action is of the most extraordinary nature, brought about by exceedingly serious world events. Clearly, under such circumstances, there resides in the President and the Executive Branch of the United States government, ample authority to suspend application of an Executive Agreement between the United States and a foreign country, whether or not such a suspension is provided for under the specific terms of the Agreement. This is a political question which is clearly one for the President.[86]

Finally, LOT argued that it had not received sufficient notice to adequately respond to the CAB's precipitous action.[87] The Board was similarly unsympathetic to this argument:

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[82] Polskie Linie Lotnicze (LOT), C.A.B. Order No. 81-12-171, at 1 (1981).

[83] *Id.* at 2.

[84] *Id.*

[85] *Id.* at 3.

[86] *Id.* at 2.

[87] *Id.* Robert Reed Gray, then U.S. Counsel to LOT, recalls with disbelief that the airline was served with a proposed order the day after Christmas, Saturday, December 26, and given until Monday the 28th of December to respond. Interview with Robert Reed Gray, United States Counsel to LOT (Aug. 5, 1993) (notes on file with author).

> While the time for response was short, the time granted was reasonably related to exigencies of the situation. LOT had notice of the Board's probable action with the President's speech of December 23; LOT's attorney was personally served the morning of December 26; and LOT's agent in New York was personally contacted and notified of the service on LOT's attorney, and agreed to accept such service.[88]

In any event, the CAB explained that its suspension of LOT's operating permit was merely a formality in view of the President's action in suspending operation of the bilateral agreement.[89]

Ultimately, the Poles declined to appeal the CAB's actions in U.S. courts. Rather, they sought international arbitration, pursuant to the bilateral agreement, something in which the United States was not, according to one interested observer, anxious to participate.[90] After an extended period of time during which the United States "dragged its feet" in the appointment of arbitrators, new negotiations were opened aimed at re-establishing a bilateral agreement relationship.[91] One of the conditions imposed by the United States for re-establishment of such a relationship was that the Poles abandon the claims sought to be arbitrated — which is precisely what occurred.[92]

C. CZECHOSLOVAKIA

Unlike the cases of Poland and the USSR, the United States never acted during the Cold War period to suspend aviation relations with Czechoslovakia. It did, however, create obstacles to the profitable operation of CSA, the Czechoslovak airline, in the United States. The February 1969 Air Transport Services bilateral agreement between Czechoslovakia and the United States tracked its Polish

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[88] LOT, C.A.B. Order No. 81-12-171, *supra* note 82, at 2.

[89] *Id.* at 3.

[90] Interview with Robert Reed Gray, *supra* note 87.

[91] *Id.*

[92] *Id.*

counterpart in many ways.[93] For example, the Czech agreement contained virtually the same revocation clause as the one contained in the Polish agreement. The consultation and arbitration clauses were of a similar nature. The capacity and frequency language also paralleled the Polish bilateral agreement, although the Czech agreement provided that any consultations called for by either contracting party must begin within a period of sixty days from the date that the other contracting party received the request for consultation.[94]

Similar to the Polish agreement, the Czech bilateral agreement apparently represented stated goals of the two countries as opposed to an operational blueprint. Attached to the bilateral agreement was a letter dated the same day as the agreement from the President of the delegation of Czechoslovakia, Martin Murin, to the U.S. ambassador, Jacob Beam. In spite of the language of the agreement itself, the letter guaranteed the United States only most favored nation treatment for ticket sales and marketing activities of its designated carrier, not national treatment.[95] Apparently, as with the Poles, the Czechs could not assure the United States that when selling tickets in Czechoslovakia, Pan Am would be able to accept and convert Czech crowns into American dollars. The letter also provided that:

> At a time no later than twenty-two months after the Czechoslovak designated airline inaugurates scheduled service to the United States, both Contracting Parties will consult for the purpose of confirming that mutually acceptable conditions have been achieved for the airlines of each Contracting Party to conduct their business activities in the territory of the other . . . on the basis of implementation of Article X [which provides for profit repatriation in convertible currency] to a mutually acceptable extent.[96]

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[93] Air Transport Agreement, Feb. 28, 1969, U.S.-Czech., T.I.A.S. No. 6644.

[94] *Id.* at 408-13.

[95] *Id.* at 417.

[96] *Id.*

The letter then noted that the bilateral agreement would terminate automatically unless mutually acceptable conditions were developed for the period beginning twenty-two months after February 28, 1969.[97]

In May 1972, following a protracted and difficult negotiation, a protocol was signed in Prague, which amended the February 1969 bilateral agreement.[98] The key provisions of that protocol included:

— CSA, the Czechoslovak designated airline, would be required to appoint Pan Am, the U.S.-designated carrier, as its exclusive general sales agent and airport ground handling agent in the United States; CSA was no longer to be allowed to sell its own tickets or do its own ground handling in the United States;
— Pan Am was granted the right to continue to sell its tickets within Czechoslovakia for convertible currency; CSA would continue to sell Pan Am tickets within Czechoslovakia for local currency; and
— The parties agreed to consultations prior to May 31, 1974 if either sought such consultations for purposes of extending the original air transportation agreement.[99]

In 1974, the countries extended the agreement for an additional year subject to minor amendment.[100] The same bilateral agreement was extended once more in 1975 for a period running until the end of December 1976.[101]

In 1977, the bilateral agreement was again amended.[102] The significance of this new agreement was that in return for a two year extension of the bilateral agreement by the

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[97] *Id.*

[98] Protocol Modifying and Extending the Agreement of Feb. 28, 1969, May 24, 1972, T.I.A.S. No. 7356.

[99] *Id.* at 909-11.

[100] Exchange of Notes Between the American Charge d' Affairs ad interim and the Czechoslovak Ministry of Foreign Affairs, May 28, 1974, T.I.A.S. No. 7881.

[101] Exchange of Notes Between the American Chargé d'Affairs ad interim and the Czechoslovak Ministry of Foreign Affairs, June 17 and July 29, 1975, T.I.A.S. No. 8132, at 1744.

[102] Exchange of Notes Between the American Chargé d'Affairs ad interim and the Czechoslovakia Ministry of Foreign Affairs, Aug. 12, 1977, T.I.A.S. No. 8868.

United States, the Czechs agreed that CSA would "undertake a two-year sales quota objective for interline sales on the United States designated airline's worldwide system of 2,000,000 dollars plus any amount by which actual 1976 interline sales by the Czechoslovak designated airline are less than 891,400 dollars."[103] This sales requirement became a permanent fixture. Year after year, CSA was required to generate specified amounts of interline revenue for Pan Am.[104] Eventually, the interline sales quotas and other requirements imposed in CSA's operating permit by the CAB came to be viewed by the airline as unreasonable and unfair.

In 1982, CSA petitioned the CAB for relief from a number of these requirements. Specifically, the CSA petition sought to permit CSA to appoint a ground handling agent other than Pan Am, dispense with the requirement that CSA appoint Pan Am as its general sales agent in the United States, and relieve CSA of the net interline sales requirement for 1983 of 1.4 million dollars.[105] CSA's petition traced the history of the bilateral aviation relationship between Czechoslovakia and the United States. This historical review noted two instances when the United States took punitive measures against CSA in retaliation for actions taken by the Czechoslovak government.

After receiving its first section 402 permit from the United States on January 12, 1970,[106] CSA expended upwards of $200,000 to obtain a lease and specially design and outfit ground floor ticket offices on Fifth Avenue in New York.[107] When, in 1972, Czechoslovakia continued to maintain that Pan Am, like other foreign airlines, would not be permitted to sell its own tickets in Czechoslovakia for Czech crowns, the United States adopted the position that CSA would no longer be permitted to sell its

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[103] *Id.* at 1071.

[104] *See* Petition of Czechoslovak Airlines for Certain Exemptions, C.A.B. Docket No. 41,654 (Aug. 18, 1983).

[105] *Id.* at 1-2.

[106] *Id.* at 4.

[107] *Id.*

own tickets in the United States.[108] According to the Czechs, however, they were merely treating Pan Am on a most favored nation basis since no foreign carriers were allowed to sell their own tickets for Czech crowns in Czechoslovakia.[109] The United States rejected this argument and terminated CSA's right to sell its tickets in the United States. This action deprived CSA of effective use of the Fifth Avenue ticket office, constructed at a substantial expense.

Having invested so heavily in a New York ticket office, CSA attempted to determine in 1978 whether it would be permitted to sell its own tickets within the United States at some future date.[110] In the alternative, CSA sought

> a simple statement [from the United States government] confirming the original 1972 restriction and indicating that CSA's ability to sell its own tickets would not soon be restored. With such a statement, CSA hoped that it might be able to rely upon the doctrine of *force majeure* and thus, in some small measure, contain the scope of its potential liability for cancellation of the 15-year office lease.[111]

The U.S. government refused to respond in either direction to CSA's inquiry.[112] Ultimately, CSA abandoned its lease in New York and suffered hundreds of thousands of dollars in losses as a result.[113] CSA's misfortune with its ticket offices extended from New York to Chicago.

CSA opened its Chicago office in the late 1960's and hired a number of U.S. citizens.[114] In the early 1980's, a staff member of the American Embassy in Czechoslovakia was stopped on her way back from a trip to West Germany. Czech authorities searched her car and allegedly

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[108] *Id.* at 5.
[109] *Id.* at 5, 7-8.
[110] *Id.* at 9.
[111] *Id.* at 9-10.
[112] *Id.* at 10.
[113] *Id.*
[114] *Id.* at 28-29 n.2.

found a cache of drugs.[115] As a result, the Czech government informed the State Department that this individual was *persona non grata* in Czechoslovakia.[116] The individual staffer, as well as the State Department, contended that the staffer had been set-up by Czech authorities in order to expel her from the country.[117] Accordingly, the State Department informed the Czech government that failure to remove the staffer from the status of *persona non grata* would result in retaliation by the United States. The Czechs refused to back down and so did the United States. CSA's Chicago office, established at considerable expense and employing mainly U.S. nationals, was promptly ordered shut down.[118]

D. LEBANON

The history of the aviation relationship between the United States and Lebanon prior to 1985 is sketchy at best. An original bilateral agreement was signed in September 1972.[119] That agreement provided for the designation by each government of airlines to serve Beirut and points within the United States.[120] An exchange of notes at the time that the bilateral agreement entered into force provided for the agreement's automatic termination, subject to intergovernmental consultations, in May 1976.[121] The bilateral agreement was extended in mid-1976, subject to certain conditions imposed by the United States.[122]

By 1977, apparently the only air service between Lebanon and the United States was being flown by a Lebanese

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[115] Interview with Allan Mendelsohn, Counsel to CSA (June 10, 1992) (Notes on file with author).

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] Air Transport Agreement, Sept. 1, 1972, U.S.-Lebanon, T.I.A.S. No. 7546.

[120] *Id.* at 253.

[121] *Id.* at 263.

[122] Exchange of Notes Between the American Embassy and the Lebanese Ministry of Foreign Affairs, Mar. 29, May 18, and May 25, 1976, T.I.A.S. No. 8304.

charter carrier, TMA.[123] Middle East Airlines (MEA), the Lebanese passenger carrier, was not flying to the United States. The U.S. designated airline, Pan Am, also offered no service.[124] In 1982, however, the Lebanese indicated a desire by MEA to provide limited air service between Beirut and New York.[125] The United States agreed to permit start-up of such service, and the Lebanese agreed to permit passenger or cargo service by U.S. carriers.[126]

In June 1985, TWA flight 847 was hijacked to Beirut.[127] The failure thereafter of the Lebanese to cooperate in prosecuting or extraditing the hijackers[128] caused anger and consternation at the highest levels of government in the United States. Shortly thereafter, President Reagan, pursuant to section 1114(a) of the Federal Aviation Act of 1958,[129] determined that "Lebanon [wa]s acting in a manner inconsistent with the convention for the Suppression of Unlawful Seizure of Aircraft." As a result, Reagan announced the suspension of all operating rights for all carriers servicing Lebanon, including rights through interline agreements. President Reagan also suspended the rights of MEA and TMA to service the United States.[130]

Two days after the President's announcement, the Department of Transportation (DOT) issued a show cause order in an attempt to further expand upon the matter.[131] The proposed DOT additions to all section 402 permits held by foreign carriers and to all exemptions held by

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[123] Exchange of Notes Between the American Ambassador and the Lebanese Minister of Foreign Affairs, Sept. 24 and Oct. 13, 1977, T.I.A.S. No. 8722, at 7479.

[124] *Id.* at 7479-80.

[125] Exchange of Notes Between the United States Department of State and the Lebanese Embassy, Dec. 22, 1982, T.I.A.S. No. 10,489.

[126] *Id.*

[127] BARRY E. CARTER, INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD LEGAL REGIME 59 (1988).

[128] *Id.*

[129] 49 U.S.C. app. § 1514 (Supp. III 1991).

[130] Presidential Determination No. 85-14, 50 Fed. Reg. 31835 (1985).

[131] *In re* Security of Aircraft and Safety of Passengers Transiting Lebanon, D.O.T. Order No. 85-7-15 (July 2, 1985).

both U.S. and foreign carriers stipulated that "effective immediately and until further order of the Department, the holder and its agents shall not sell in the United States any transportation by air which includes any type of stop in Lebanon."[132] The purpose of this requirement, according to the DOT, was to "prohibit the sale in the United States of any ticket or the issuance in the United States of any airway bill with Lebanon in the itinerary, regardless of whether the flight in question serves the United States."[133]

MEA argued that the DOT's proposed expansion of President Reagan's actions was unnecessary. The DOT summarized MEA's contentions: "[N]o American carriers serve Beirut . . . few Americans travel there and . . . the suspension of all air service between the United States and Lebanon would not prevent future hijackings."[134]

The DOT was not impressed with MEA's arguments. It indicated that the "public interest" required it to actively discourage travel between Lebanon and the United States.[135] Further, the DOT claimed that it believed the Beirut airport was unsafe for American carriers and citizens, and that, as a matter of foreign policy, the airport should not be used until properly secured by Lebanon's government.[136] The DOT emphasized that it had no desire to punish MEA, but "the United States government views the closing of Beirut Airport as one step in its fight against terrorism and its supporters."[137]

While the DOT terminated MEA's authority to serve the United States,[138] it continued to allow MEA to wetlease a 747 to Egyptair for use by that carrier on charter flights between the United States and various Euro-

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[132] *Id.* at 2.

[133] *Id.*

[134] *In re* Security of Aircraft and Safety of Passengers Transiting Lebanon, D.O.T. Order No. 85-7-45, at 1 (July 9, 1985).

[135] *Id.* at 2.

[136] *Id.*

[137] *Id.*

[138] *Id.*

pean points.[139] The basis for this decision was a finding by the DOT that the airplane in question was operated by Egyptair with its own colors and that Egyptair operations were unrelated to MEA's.[140] The DOT added certain restrictions on the use of the aircraft to ensure that Egyptair would fly it exclusively and that the aircraft would not transit Lebanon for any reason. The DOT also indicated that the aircraft would be subject to additional security measures upon landing in New York.[141]

The aviation sanctions with respect to Lebanon are still in place. In fact, they became the subject of a DOT enforcement effort in 1993 that generated widespread press attention. Specifically, the DOT determined that as Lufthansa had violated certain ticketing restrictions included in the Lebanon order, it would be heavily fined.[142] The DOT disclosed that numerous other airlines were under investigation on the basis of discovery that as many as 25,000 reservations had been made in violation of the DOT order.[143] The DOT also apparently discovered that MEA had been issuing multiple tickets to passengers, routing U.S. outbound passengers on other international carriers from the United States to Europe, with connections on MEA between Europe and Beirut issued on a separate ticket that apparently showed a Damascus or Amman destination — even though the flights actually only operated to Beirut.[144] In October 1993, DOT announced a financial settlement with MEA emanating from the alleged violations by the carrier of the 1985 order. DOT indicated that it would "issue a consent order directing [MEA] to cease and desist" from violating departmental

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[139] *In re* Middle East Airlines Airliban, S.A.L. (MEA), D.O.T. Order No. 85-7-14, at 2 (July 2, 1985).

[140] *Id.*

[141] *Id.* at 2.

[142] *DOT Cracks Down on Illegal Transportation to Lebanon*, AVIATION DAILY, June 10, 1993, at 393.

[143] *Id.*; *DOT Presses Industry to Undo Reservations for Lebanon*, TRAVEL WKLY., June 14, 1993, at 65.

[144] AVIATION DAILY, *supra* note 142, at 393.

restrictions.[145] The carrier was also assessed a $500,000 fine, $275,000 of which will not have to be paid if MEA commits no further violations.[146]

E. SYRIA

> Safe in Syria's London Embassy, Nezar Mansur Hindawi could sit back and contemplate his day's work. A few hours before, on the morning of April 17, Hindawi had escorted his pregnant Irish girlfriend . . . to . . . Heathrow Airport, where she planned to board an El Al jumbo jet. What she didn't know was that the flight bag Hindawi had given her contained 10 pounds of explosives set to go off on the flight [to] Tel Aviv.[147]

El Al's airport security personnel discovered the bomb before Hindawi's girlfriend boarded the plane. Eventually, following his capture, Hindawi disclosed that he had been flown to London on Syrian Arab Airlines to carry out an attack on the El Al plane. He had been escorted by a Syrian intelligence officer. Hindawi was allegedly carrying a Syrian passport with a false name.[148] He also disclosed to British investigators Syrian complicity in the bombing of a West Berlin discotheque that resulted in the death of American military personnel.[149] Hindawi eventually revealed that Syrian armed forces personnel had in fact designed and planned the El Al attack and had supplied the cash and explosives to carry it out.[150]

In response to the disclosures of complicity and conspiracy by the Syrian government and military, the British took the extraordinary measure of breaking diplomatic relations with Syria.[151] The American response was more measured. In November 1986, President Reagan directed

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[145] *DOT Levies Fine on Middle East Airlines for Violations of Lebanon Travel Ban*, U.S. Dep't of Transp. Press Release, Oct. 14, 1993 at 1.

[146] *Id.*

[147] *A Syrian Smoking Gun?*, NEWSWEEK, May 5, 1986, at 40.

[148] *Id.*

[149] *Id.*

[150] Jill Smolons, *Questions About a Damascus Connection*, TIME, Oct. 20, 1986, at 53.

[151] Michael Serrill, *Making the Syrian Connection*, TIME, Nov. 3, 1986, at 39.

the Secretary of Transportation to take necessary actions to preclude the sale of air transportation in the United States on Syria's flag carrier.[152] The DOT responded by issuing a show cause order proposing to ban such sales in the United States.[153] The basis of the show cause proceeding was that:

> Syria is a party to the Chicago Convention. One of the underlying principles of the convention is the safe and orderly development of international air transport. Pursuant to Chapter VI of the Convention, the International Civil Aviation Organization has adopted standards which are binding on the parties to the Convention, including Annex 17's standard 4.1.3. which requires States to "take the necessary measures to prevent weapons or any other dangerous devices . . . from being introduced, by any means whatsoever, on board an aircraft engaged in the carriage of passengers." The actions of the Government of Syria not only contravene Syria's general and specific obligations under international law and the Convention, but are by their very nature antithetical to the premises of the Convention governing the conduct of aviation services.[154]

The DOT finalized the proposed order shortly thereafter.[155]

F. LIBYA

In January 1986, President Ronald Reagan imposed sweeping economic sanctions against the government of Libya. The basis for the sanctions was the purported Libyan involvement in bloody terrorist attacks on several European airports.[156] While the Executive Order promulgating the sanctions against Libya relied upon nu-

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[152] *In re* Suspension of Sales in the U.S. on Syrian Arab Airlines, D.O.T. Order No. 86-11-30 (Nov. 14, 1986).

[153] *Id.* at 1-2. Syrian Arab Airlines was not providing any direct service to the United States at the time.

[154] *Id.*

[155] *In re* Suspension of Sales in the United States on Syrian Arab Airlines, Final Order, D.O.T. Order No. 86-12-48 (Nov. 24, 1986).

[156] CARTER, *supra* note 127, at 195.

merous statutes for authority,[157] the President's action was principally based on the International Emergency Economic Powers Act,[158] commonly known as IEEPA.[159] In sum,

> [t]hese sanctions include[d] a ban on almost all imports from Libya and exports to it, a prohibition on any new loans or other credits to Libya, financial controls that effectively prohibit most travel to Libya or living there, and a freeze on all Libyan property interests in the United States or in the control of any United States person, including overseas branches of United States entities.[160]

With respect to aviation, President Reagan's Executive Order specifically precluded:

> [a]ny transaction by a United States person relating to transportation to or from Libya; the provision of transportation to or from the United States by any Libyan person or any vessel or aircraft of Libyan registration; or the sale in the United States by any person holding authority under the Federal Aviation Act of any transportation by air which includes any stop in Libya.[161]

The Executive Order also precluded travel to or from Libya by any U.S. citizen[162] and authorized the Secretary of the Treasury, in conjunction with the Secretary of State, to develop rules and regulations to effectuate the President's orders.[163] Regulations concerning travel to and from Libya were eventually promulgated.[164]

Immediately following the issuance of the President's Executive Order, the DOT issued a related order to show

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[157] Exec. Order No. 12,543, 51 Fed. Reg. 875 (1986).

[158] Pub. L. No. 95-223, tit. II, § 202, 91 Stat. 1626 (codified as amended at 50 U.S.C. §§ 1701-04 (1988 & Supp. II 1990)).

[159] *See* CARTER, *supra* note 127, at 195.

[160] *Id.*

[161] Exec. Order, *supra* note 157, at 133. This was not the first time that the United States had imposed restrictions on travel to Libya. In 1981, in response to a series of international incidents, the United States had restricted use of U.S. passports to gain entrance into Libya. *See* Bialos & Juster, *supra* note 1, at 803-05.

[162] Exec. Order, *supra* note 157, at B3, B4.

[163] *Id.* at B4.

[164] *See* 31 C.F.R. § 550.207 (1993).

cause. The DOT proposed to add several provisions to all section 402 permits held by foreign carriers and to those exemptions held by U.S. and foreign carriers, to be effective February 1, 1986. These provisions precluded the sale of air transportation within the United States that included any stop in Libya and barred flights to or from the United States of any Libyan-registered aircraft.[165] The DOT additionally proposed to bar any transaction involving transportation to or from Libya.[166] This order was finalized shortly thereafter.[167]

G. South Africa

The U.S.-South African bilateral agreement was signed in 1947 and provided for service by South African and U.S.-designated carriers between the two countries.[168] The original bilateral agreement was amended twice to revise route designations, once in 1953 and again in 1968.[169] Article IX of the original bilateral agreement contained an arbitration[170] clause that stipulated:

> Except as otherwise provided in this agreement or its annex, any dispute between the contracting parties relative to the interpretation or application of this agreement or its annex, which cannot be settled through consultation, shall be submitted for an advisory report to a tribunal of three arbitrators . . . . The executive authorities of the contracting parties will use their best efforts under the powers available to them to put into effect the opinion expressed in any such advisory report.[171]

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[165] *In re* Suspension of Operations Between the U.S. and Libya, D.O.T. Order No. 86-1-15, at 2 (1986).

[166] *Id.*

[167] *In re* Suspension of Operations Between the U.S. and Libya, D.O.T. Order No. 86-1-15 (1986).

[168] Air Services Agreement, May 23, 1947, U.S.-S. Afr., T.I.A.S. No. 1639.

[169] Exchange of Notes Between the U.S. Secretary of State and the Ambassador of the Union of South Africa, July 21 and Nov. 2, 1953, 143 U.N.T.S. 334; Exchange of Notes Between the U.S. Secretary of State and the Ambassador of the Union of South Africa, June 28, 1968, 706 U.N.T.S. 287.

[170] 143 U.N.T.S. at 504.

[171] *Id.*

Article XI specifically set forth the procedure for termination of the bilateral agreement. That article provided that either party could request consultations to revise the bilateral agreement and that such consultations had to be commenced within sixty days of the date they were requested.[172] To terminate the agreement, the consultations contemplated by Article XI had to be initiated.[173] Thereafter, either side could give notice to the other of its desire to terminate the agreement.[174] Once notice of termination had been given, the agreement itself would terminate one year hence.[175]

The first real political battle that South African Airways (SAA) had to fight in the United States related to its government's apartheid system and came in 1973. At that time, SAA filed an application with the CAB to amend its foreign air carrier permit to allow an intermediate stop in Sal Island and/or Las Palmas. Prior to the application, SAA had been operating flights between New York and South Africa via Rio de Janeiro.[176] The amendment to the bilateral agreement made on June 28, 1968, however, had provided the right of a South African-designated carrier to serve the Canary Islands in Spain as an intermediate stop.[177] Prior to the CAB reviewing SAA's application, a hearing was held by an Administrative Law Judge (ALJ) to evaluate the merits of the new routing application.[178] An assortment of individuals and groups sought, and were eventually granted, permission to intervene in the proceedings before the ALJ.[179]

Right of intervention was granted to Congressional members of the American Committee on Africa, the Black

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[172] *Id.* at 504-05.

[173] *Id.*

[174] *Id.*

[175] *Id.* at 505.

[176] South African Airways Permit Amendment, C.A.B. Order No. 73-102 (Sept. 5, 1973).

[177] Exchange of Notes Between the U.S. Secretary of State and the Ambassador of the Union of South Africa, June 28, 1968, 706 U.N.T.S. 287, 288-89.

[178] C.A.B. Order No. 73-102, *supra* note 176, at 382.

[179] *Id.*

United Front of Washington, D.C., the African Heritage Studies Association, and IFCO-Action.[180] The intervenors contended that the ALJ and the Board were incapable of determining whether SAA was "fit, willing and able to perform"[181] the new service because "facts bearing upon the racially discriminatory visa policies of the South African Government and racial segregation of passengers in foreign air transportation within South Africa are crucial to the Board's determinations."[182] The unwillingness of the Board to receive evidence related to such issues, according to the intervenors, precluded grant of the sought-after authority.[183] SAA responded to this argument by contending that it did not discriminate in any fashion in providing foreign air transportation.[184]

The ALJ ultimately felt compelled to award to SAA the sought-after route authority because the route had been provided for in the bilateral agreement.[185] He explained:

> Any attempts to deal with another government's general racial or religious practices, as distinguished from discrimination in air transportation, should be the subject of a single overall United States policy. In the absence of enactment by the Congress of an overall Government policy, only the President can fashion a policy covering not only the Board but other Government agencies as well.[186]

The ALJ further found that there had been no race-based discrimination against U.S. citizens using SAA or the Johannesburg airport.[187] Ultimately the CAB proved as reluctant to evaluate the policies and procedures employed by SAA, at least with respect to domestic flights. "The effect of such examination would be to require the Board to evaluate the activities of a foreign carrier within its

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[180] *Id.*
[181] *Id.* at 384.
[182] *Id.* at 385.
[183] *Id.*
[184] *Id.* at 384-85.
[185] *Id.* at 385.
[186] *Id.* at 386.
[187] *Id.* at 386-87.

home country and to pass judgment on the internal policies of a foreign government."[188] SAA's route rights were amended as requested by the carrier.

Anti-apartheid activists would have to wait until 1985 before Congress began to earnestly debate taking actions against South Africa because of its racial policies. On the House side, the Committee on Foreign Affairs and the Ways and Means Committee, and on the Senate side, the Banking Committee and the Foreign Affairs Committee, would play leading roles in the shepherding of anti-apartheid legislation through Congress. Eventually, the House Foreign Affairs Committee reported H.R. 4868, which included a provision prohibiting the takeoff and landing in the United States of any aircraft owned by the South African government or by South African nationals.[189] The Senate Foreign Relations Committee released S. 2701, which included a provision to terminate the U.S./South African Air Services Agreement.[190]

During initial debate in the Senate on S. 2701, Senator Lugar, a member of the Foreign Relations Committee that had favorably reported the bill, specifically explained that the bill was designed to end "landing rights for the state owned airline . . . immediately upon the expiration of the notice period required by international law under which these flights take place."[191] What Senator Lugar was referring to was the twelve month termination clause contained in the bilateral agreement.[192] But other members of the Senate were not content with the notion that landing rights would be denied on such a basis. Senator Sarbanes, joined by Senator Kassenbaum, offered an amendment to section 306(a):

> (1) The President shall immediately notify the Government of South Africa of his intention to suspend the rights

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[188] *Id.* at 379.

[189] H.R. REP. No. 638, 99th Cong., 2d Sess., pt. 2 (1986).

[190] S. REP. No. 370, 99th Cong., 2d Sess., pt. 1 (1986).

[191] 132 CONG. REC. 21,471 (daily ed. Aug. 14, 1986) (statement of Sen. Lugar).

[192] Air Services Agreement, *supra* note 168, at 505.

> of any air carrier designated by the Government of South Africa under the [bilateral agreement] . . . .
> (2) Ten days after the date of enactment of this Act, the President shall direct the Secretary of Transportation to revoke the right of any air carrier designated by the Government of South Africa under the Agreement to provide service pursuant to the Agreement.[193]

Senator Sarbanes clearly articulated the purpose of offering what would later be viewed by some as a poorly worded amendment:

> As the bill is now written, notice has to be given to terminate the current agreement. A year would then have to elapse before aircraft were actually prohibited from flying . . . . When the committee considered immediate sanctions and future sanctions to express our opposition to apartheid, the termination of air transportation was included among those that would be imposed immediately.
>
> The way section 306 has been drafted, it does not accomplish this goal. What the provision does, as currently written, is set in motion the termination of our bilateral air service agreement . . . . The amendment that the Senator from Kansas and I have offered would bring a suspension of air service 10 days after the enactment of the legislation. It would have the President notify South Africa[n] authorities of his intention to suspend and ten days later, the suspension would take effect. . . .
>
> *It is my judgment, after analyzing the agreement and consulting with legal experts, that the United States is within its rights to suspend air service in the interim without violating provisions of the agreement,* a concern raised by some. I am convinced that it is perfectly proper for the United States to engage in such a suspension because the agreement allows such an action in the event either party has failed to fulfill the terms of the agreement.
>
> I think it is clear that the government of South Africa has breached section IV of the annex to the agreement which has an objective to "foster and encourage the widest possible distribution of the benefits of air travel for the

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[193] 132 CONG. REC. 21,561 (daily ed. Aug. 14, 1986) (statement of Sen. Sarbanes).

> good of mankind . . . and to stimulate international travel as a means of promoting friendly understanding and goodwill among peoples." I do not believe anyone can honestly assert that the South African Government has permitted all its citizens fully to enjoy the benefits which the agreement envisioned. As my colleagues will recall, the South African Government has prohibited Reverend Boesak, Bishop Tutu, and other leaders in South Africa from leaving the country from time to time.[194]

Senator Pell followed up Senator Sarbanes' statement and indicated that it was his understanding that the committee had intended to impose the aviation sanctions immediately, rather than one year hence.[195] But Senator Lugar was clearly not happy with the proposed amendment. He explained that the State Department had indicated that:

> if we unilaterally suspend, terminate or otherwise interfere with the [bilateral] agreement, the South African government would have a right to take the United States to arbitration as provided in article 9 of this bilateral agreement . . . . And if the arbitrators were to find in favor of South Africa . . . we would be obliged to seek an appropriation from Congress to pay the award.[196]

Senator Sarbanes did not, however, put much credence in the State Department's position:

> [T]he State Department is against sanctions altogether, so I find it very difficult to place any stock in the Department's clearly self serving legal view. The position taken by the State Department runs directly counter to other expert opinion, I submit counter to the clear language of the document. The arbitration procedure set forth in article IX, to which the Senator refers says at its very outset,

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[194] *Id.* at 21,561-62 (emphasis added).

[195] *Id.* at 21,562.

[196] *Id.*; *cf.* Kevin Chamberlain, *Collective Suspension of Air Services with States Which Harbor Hijackers*, 32 INT'L & COMP. L.Q. 616, 628 (1986) (noting that countries terminated and denounced air service agreements with Afghanistan in accord with the denunciation requirements of bilaterals that provided for a one year wind-down period).

> "[e]xcept as otherwise provided in this agreement or its annex."
>
> "Except as otherwise provided," and Mr. President it is otherwise provided. There is another section, article VI which provides that each contracting party reserves the right to withhold or revoke a certificate or permit to an air carrier in case of failure to fulfill the conditions under which the rights are granted in accordance with the agreement and its annex. I quoted earlier from a provision of the annex with respect to encouraging free travel, and underscored *the clear violation of the South African government of that provision.*
>
> What I am saying is that they have violated the agreement — the South African Government has violated the agreement. In view of that fact, we are entitled to invoke article VI to carry out the suspension of air travel. The indication of article VI, with respect to suspension operates separate and apart from the arbitration provision of article IX, which clearly states, "except as otherwise provided in this agreement or its annex."[197]

The Sarbanes amendment was eventually added to the Anti-Apartheid Act,[198] but at the end of September 1986, President Reagan vetoed that act.[199] The veto was eventually overridden by the House and Senate, and the act became law.[200]

The United States was not alone in its imposition of sanctions against the South African government. Other countries moved against South Africa in the tourism and aviation areas. For example, Great Britain passed legislation calling for a voluntary end to promotion of tourism to South Africa.[201] The Commonwealth of Nations took even more dramatic steps. Like the United States, the Commonwealth ultimately banned airlinks with South Africa. Additionally, the Commonwealth precluded South Africans from obtaining visas in its consulates and banned

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[197] Statement of Sen. Sarbanes, *supra* note 193, at 21,563 (emphasis added).
[198] *Id.* at 21,564.
[199] 132 CONG. REC. 27,076 (daily ed. Sept. 29, 1986).
[200] *Id.* at 27,101.
[201] *Id.* at 27,089-90.

the promotion of South African tourism in the Commonwealth.[202] Japan suspended airlinks with South Africa and precluded Japanese government officials from using the services of South African Airways. Japan also suspended the issuance of tourist visas for South Africans and requested its citizens to refrain from traveling to South Africa.[203]

Following the override of his veto of the Anti-Apartheid Act, President Reagan issued Executive Order No. 12571, which set forth the duties of the various departments of the Executive Branch with respect to implementation of the Act.[204] Not surprisingly, the DOT was assigned the responsibility of implementing the provisions of section 306 dealing with suspension of air service between the two countries.[205] The day after the President issued his Executive Order, the DOT issued a show cause order in which it proposed to revoke the section 402 permit of SAA.[206] SAA launched a full fledged attack in response to the show cause proceeding in an effort both to forestall the inevitable and to preserve its record for subsequent legal action.

SAA made several different arguments before the DOT in the show cause proceeding. First, SAA argued that its rights to serve the United States could not be abridged prior to termination of the bilateral agreement and that the agreement could only be terminated after the one year notice of termination period had run.[207] The DOT rejected this contention, finding that "Congress could not have intended that we wait until after the agreement had been terminated because, by that time, there would be no existing agreement under which a South African carrier

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[202] *Id.*

[203] *Id.*

[204] Exec. Order No. 12,571, 51 Fed. Reg. 209 (1986).

[205] *Id.* at 39,505.

[206] *In re* Termination of Air Carrier Operations Between the United States and South Africa, D.O.T. Order No. 86-13-60 (1986).

[207] *In re* Termination of Air Carrier Operations Between the United States and South Africa, D.O.T. Order No. 86-11-29 (1986).

would be designated or have rights."[208]

Second, SAA contended that immediate revocation of its operating rights was not required by the language of the Anti-Apartheid Act. The DOT dismissed this contention as well, pointing to the ten day period Congress had included in the legislation, during which time the President was to direct the Secretary of Transportation to take those actions contemplated by the Anti-Apartheid Act.[209] "Had it expected DOT to wait the year that it takes to terminate the Agreement, there would have been no point in instructing the President to direct the Secretary in ten days."[210]

Third, SAA argued that the aviation sanctions contained in the Anti-Apartheid Act conflicted with section 1102(a) of the Federal Aviation Act, which required the Secretary of Transportation to act "consistently with any agreement in force between the United States and another country."[211] The DOT responded by suggesting that the more specific statutory language of the Anti-Apartheid Act governed over the more general language of the referenced section of the Federal Aviation Act.[212]

Finally, SAA asserted that the revocation of its operating permit would constitute a breach of the treaty between the United States and South Africa.[213] The DOT rejected this argument on the grounds that the President had "sufficient authority to take actions which may be contrary to Executive Agreements. Similarly, it is established that Congress may act in a manner that is inconsistent with Executive Agreements."[214] The DOT purportedly found support for these concepts in two cases, one of which was the circuit court decision in *Gold-*

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[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.* at 4.
[212] *Id.*
[213] *Id.* at 4-5.
[214] *Id.* at 5.

water v. Carter.[215] The citation to *Goldwater v. Carter* was simply improper given that the opinion in that case had been vacated by the United States Supreme Court.[216]

Finally, SAA contended that the show cause order, which afforded it two days notice prior to hearing, denied it due process rights. The revocation of its permit, SAA argued coming so quickly after issuance of a final order by the DOT, did not provide it sufficient time to end its U.S. operations.[217] The DOT, not surprisingly, was unimpressed with these arguments and rejected them as well.[218] In fact, there is no evidence that the DOT gave any thought to what would predictably be enormous financial losses resulting from such a rapid service cutoff, not to mention the many U.S. employees whose jobs would be terminated and the passengers whose travel would be disrupted. Having dispensed with SAA's objections, the DOT then proceeded to revoke SAA's operating permit and conditioned the operating authority of U.S. carriers to preclude service to South Africa.[219]

Not content with the drubbing it had taken at the hands of the DOT, SAA filed a petition for review with the United States Court of Appeals for the District of Columbia.[220] In its petition, SAA argued that the immediate revocation of its landing permit was barred by the bilateral agreement. SAA also contended that the order for immediate revocation was not mandated by the terms of the Anti-Apartheid Act and that the order violated provisions of the Federal Aviation Act, which required that the Secretary of Transportation construe statutes and executive agreements in conjunction with outstanding international treaties "so as to give effect to both."[221] The court ulti-

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[215] 617 F.2d 697 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979).

[216] *See Goldwater*, 444 U.S. at 996.

[217] D.O.T. Order No. 86-11-29, *supra* note 207, at 5.

[218] *Id.* at 5-6.

[219] *Id.* at 6.

[220] South African Airways v. Dole, 817 F.2d 119 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 896 (1989).

[221] *Id.* at 121.

mately held against SAA.[222]

SAA's first principal argument before the court was that section 306(a)(2) was unclear as to when the Secretary could revoke SAA's landing permit. As a result, the Secretary could have timed the actual suspension of the permit "to coincide with the termination of the Agreement."[223] The court rejected this analysis:

> Subsection 306(a)(1) required the President to "*immediately notify*" the South African government of his intention to suspend such service, and subsection 306(a)(2) called for him to direct the Secretary ten days later to revoke the right of any carrier designated by the government of South Africa to provide air service pursuant to the Agreement.[224]

In short, the court found that the clear intention of Congress was to see SAA's permit revoked in the most expeditious manner possible.[225]

SAA's second principal argument was that section 306 had to be interpreted consistently with the bilateral agreement so as not to "require the United States to violate its obligations under an executive agreement."[226] The court rejected this contention as well. First, the court suggested that there was nothing in the legislative history to indicate that Congress intended to violate the bilateral agreement.[227] The court then explained that even if the effect of the congressional action *was* to violate the treaty, it was not for the court to make such a determination in the case at bar.[228] But then the court went on to assume *arguendo* that in fact the relevant section of the Anti-Apartheid Act did contravene the terms of the bilateral agreement.[229] The court explained that, under these circumstances, a re-

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[222] *Id.*
[223] *Id.* at 124.
[224] *Id.* (emphasis added).
[225] *Id.*
[226] *Id.* at 124-25.
[227] *Id.*
[228] *Id.*
[229] *Id.*

peal by implication might be found.[230] Here, the court explained, congressional intent was unambiguous. Therefore, if there was a contradiction between the statute and the bilateral agreement, the statute would prevail.[231]

Finally, the court found that the generalized mandate of section 1102 of the Federal Aviation Act[232] was superseded by the specific language of the Anti-Apartheid Act. The language, explained the court, directed the Secretary of Transportation to take actions that, at the very least, were inconsistent with the bilateral agreement.[233]

II. THE PROPRIETY OF U.S. ACTIONS UNDER INTERNATIONAL LAW

As should be evident from the discussion above, legal analysis of United States' use of treaty bending, treaty breaking, and economic sanctions in international aviation by necessity involves facts and behavior that are by no means consistent. In the case of South Africa, for example, the United States was faced with the frustration of a trading partner's bilateral aviation rights. On the other hand, U.S. action against Aeroflot, relating to the Soviet Union's purported complicity in imposition of martial law in Poland, did not raise a treaty breach question, as Aeroflot's ability to serve the United States was based only on comity and reciprocity.

Yet another category of U.S. action came as a result of alleged violations by other countries of multilateral conventions and customary international law. The sanctions imposed on Syria, which had no existing bilateral aviation relationship with or airline service to the United States, fall into this category. Each of the factually disparate instances where the United States took action against an-

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[230] *Id.* at 125-26.

[231] *Id.* at 126.

[232] 49 U.S.C. app. § 1502(a) (1988).

[233] *South African Airways*, 817 F.2d at 127.

other country in the aviation sector should be evaluated to determine propriety under international law.

A. SYRIA, LIBYA AND LEBANON

The attempt to place a bomb on a civilian airliner by a Syrian did not directly harm U.S. interests. The action occurred in Great Britain, and the target was an airline of another country. Undoubtedly, there were Americans aboard the aircraft, but none were actually harmed. Nevertheless, assuming Syrian complicity in the attempted bombing — of which there was little doubt given the Hindawi confession — that country was in gross violation of various multilateral conventions and customary international law.

The limited U.S. response to this incident reflected the fact that Syria was not an active aviation trading partner with the United States. The sanctions were vertically consistent in that the alleged Syrian affront in the aviation sector was met with sanctions in that sector. Indeed, the U.S. response would fall into the category of a "third state remedy" in international law.[234] Under some modern theories of international law, a consensus exists that non-injured States can take limited actions against harm perpetrators to discourage violations of international law.[235] For example, in the Gulf War between Iran and Iraq, U.S. vessels took hostile actions against belligerents found mining international waters, even though no U.S. vessels were actually harmed.[236] And while the Vienna Convention's article 60 purports to govern breaches by States of multilateral treaties, the Convention itself does not, as one commentator noted, preclude an "independent right under customary international law" to undertake reprisals for breach of a multilateral.[237]

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[234] *See generally* Jonathan I. Charney, *Third State Remedies in International Law*, 10 MICH J. INT'L L. 57 (1989).

[235] *Id.* at 59. Charney points out that third state enforcement of international law should not be punitive but corrective in nature. *Id.* at 87.

[236] *Id.* at 58.

[237] *Id.* at 64.

To be sure, there are risks to the employment of third state remedies. Perhaps the biggest is that natural adversaries will use third state remedies as a way to harm opponents.[238] In addition, if different States employ different types of sanctions against an offending State, ultimate resolution of the dispute may be difficult. The disparate demands of those employing sanctions against the offender could make settlement unwieldy.[239] This concern suggests that resorting to a collective decision maker, together with the imposition of uniform, multilateral sanctions, is preferable.[240] The reality of geopolitics and the inherent limitations of the international legal regime, however, mean that in many instances there is little hope of imposing multilateral sanctions against an offending State.[241]

In the case of Hindawi, the U.S. actions were proper given the nature of Syria's affront to the international legal regime. Under established principles of nationality and territorial jurisdiction, the United States had the right to preclude the sale of tickets on Syrian Arab Airlines within the United States. This right prevailed even absent Syria's complicity in the Hindawi affair. The fact that Syrian Arab Airlines was a government-owned carrier and had itself been used to shepherd Hindawi into the United Kingdom lends further legitimacy to the U.S. response. Moreover, the employment of an aviation-related sanction to meet an aviation-related violation of international law gives the appearance of balance and equity.

The context of U.S. imposition of sanctions against Libya in certain ways parallels actions taken against Syria. At the time of the Libyan terrorist attacks on the Rome and Vienna airports, there was no extant United States-

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[238] *Id.* at 87.

[239] *Id.* at 90.

[240] *Id.* at 97.

[241] *Id.* at 63-64, 92-93. One of the problems with multilateral sanctions is whether any institution has the will and authority to impose them. Based upon the U.N. Charter, the U.N. Security Council should impose sanctions only in an effort to maintain international peace and security.

Libyan bilateral agreement and no passenger air service between the two countries. No U.S. interests were directly harmed in the attack, but nevertheless, the potential threat to U.S. travellers and air carriers was perceived as quite real. Moreover, there was the threat of serious economic harm to U.S. air carriers as passengers canceled or postponed plans to visit Europe by the thousands. Unlike the Hindawi episode, the terrorists succeeded in their bloody attacks on the European airports. The United States, based upon intelligence analysis, determined that the attacks could not have been carried out without the support of Libya's leader Qaddafi.[242] To the extent that Libya did indeed promote these attacks, it did so in violation of the U.N. Charter, various aviation multilaterals, and customary international law.[243]

The U.S. response to Libya, exercised as a third state remedy, was, not surprisingly, broader and harsher than with Syria. Invocation of IEEPA by President Reagan gave the Executive "practically unlimited" domestic power to impose harsh economic sanctions.[244] As a result, the Treasury Department was able to issue sweeping regulations prohibiting virtually all trade with that country.[245] The significance of the President's use of the IEEPA umbrella was that he was "characteriz[ing] state-sponsored terrorism as a national emergency."[246] Previously, both the Trading with the Enemy Act (TWEA) and IEEPA were employed to impose trade sanctions against Cuba.[247] There, however, U.S. citizens had been prohibited from traveling to Cuba under the Passport Act of 1926.[248]

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[242] Bialos & Juster, *supra* note 1, at 839-55.

[243] Kevin J. Greene, *Terrorism as Impermissible Political Violence: An International Law Framework*, 16 VT. L. REV. 461, 470-71 (1992).

[244] John P. Giraudo, *Waging Economic Warfare: The Sanction Powers Under the Constitution*, 19 N.Y.U. J. INT'L L. & POL. 935 (1987).

[245] Bialos & Juster, *supra* note 1, at 838.

[246] *Id.* at 811.

[247] Leonard B. Boudin, *Economic Sanctions and Individual Rights*, 19 N.Y.U. J. INT'L L. & POL. 803 (1987).

[248] *Id.* at 803-04.

The imposition of broad travel-related sanctions against the Libyans was appropriate under international law. There was a vertical consistency with the harm perpetrated. The United States, as with sanctions employed against Syria, could rely upon territorial and nationality jurisdiction to support its actions. It violated no treaties or agreements by imposing the travel and aviation-related sanctions.[249] To the contrary, such sanctions can be viewed as promoting the principles of aviation safety articulated in the Chicago Convention.

The implications of U.S. actions against Lebanon differed from those taken against Syria and Libya because of the existence of a bilateral agreement governing service between the two countries. The United States effectively suspended that agreement — not based upon any Lebanese failure to honor its obligations under its terms but rather — based upon Lebanon's failure to adhere to the requirements of a multilateral convention. To be sure, the sanctions employed by the United States were vertically consistent and purported to be corrective rather than punitive. But while few would dispute that Lebanon violated its legal obligations under a *multilateral* treaty, the more difficult issue is whether the U.S. response — suspending operation of the bilateral agreement and imposing other aviation related sanctions — also constituted a violation of international law.

Was the United States liable for breach of treaty? The answer is not clear. The United States could argue that a mere suspension of operating rights did not amount to a breach of treaty. If a court or arbitration panel determined that the U.S. actions had amounted to a breach, the United States might have argued, in the alternative, that its actions were justified based upon article 62 of the Vienna Convention on the Law of Treaties (Vienna Convention). Invoking the doctrine of *rebus sic stantibus*, the United States could suggest that a fundamental change of

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[249] *See* Cooke, *supra* note 1, at 195 (describing the Libyan travel related bans and a case that tested the legality of those constraints).

circumstances had occurred following the signing of the bilateral agreement that justified United States treaty suspension. While the United States is not a signatory to the Vienna Convention, it has acknowledged that the convention represents customary international law with respect to treaty obligations.[250] Article 62 of the Vienna Convention provides:

> 1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
>
> (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
>
> (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
>
> 2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
>
> (a) if the treaty establishes a boundary; or
>
> (b) if the fundamental change is a result of a breach by the party invoking it either of an obligation under the treaty or any other international obligation owed to any other party to the treaty.[251]

Clearly no one foresaw that Lebanon would be a participant in the coddling of hijackers at the time that the bilateral agreement was signed. Presumably, had the United States known that, it would not have entered into a bilateral aviation relationship with the Lebanese. But was the hijacking issue of such paramount importance as to constitute an "essential basis of the consent of the parties"?[252]

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[250] BARRY E. CARTER & PHILIP R. TRIMBLE, INTERNATIONAL LAW 78 (1991).

[251] The Vienna Convention on the Law of Treaties § 62 (1969), *reprinted in* BARRY E. CARTER & PHILIP R. TRIMBLE, INTERNATIONAL LAW SELECTED DOCUMENTS 68 (1991).

[252] *Id.*

To satisfy the requirements of article (62)(a)(1), the United States would have to prove that it operated under the assumption that Lebanon would prosecute hijackers or extradite them. Furthermore, the United States would also have to show that Lebanon's refusal to prosecute or extradite was an act that constituted a "radical change" under article 62(1)(b) such as to "transform the extent of obligations still to be performed under the treaty."[253] The United States could argue that the radical change was represented by a new safety threat to service between the two countries, namely, that hijackers, knowing of Lebanon's reluctance to take action against its brethren, would target airlines serving the country from the United States. The problem with this argument is that virtually no Americans were traveling to Lebanon. Indeed, at the time, the Lebanese carrier (MEA) was not even serving the United States with passenger flights. A hijacking threat to the lone cargo carrier actually flying between the two countries (TMA) was improbable. So at least under article 62 terms of the Vienna Convention, the United States would not be on firm ground in suspending the bilateral agreement.

This analysis, however, leaves a number of questions unanswered. For example, could the United States justify the termination or suspension of its *bilateral agreement* treaty obligations with Lebanon on the basis of that country's violation of a *multilateral* convention? Or would the U.S. response to such a violation have to conform to the dispute resolution mechanisms outlined in the multilateral itself? The Vienna Convention does not squarely address this issue. At least one commentator has suggested that violations of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft are to be anticipated: "States which are parties to the relevant convention may, when faced with an actual incident, choose for various reasons not to honor their obligations. Violations are to be expected primarily because there is no *effective* means of

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[253] *Id.*

ensuring compliance, in spite of arbitration provisions in the Convention."[254] This commentator also suggests that "any state which permits its territory to become a safe haven for hijackers creates a severe threat to the safety of international civil aviation and consequently is in fundamental breach of its obligations under the Chicago Convention."[255] Such a scenario would justify suspension of a bilateral agreement with the offending country.[256]

In sum, the United States would be hard-pressed to prevail in any claim of changed circumstances under the Vienna Convention. It would, however, seemingly have a stronger position in contending that Lebanon's violation of a multilateral aviation treaty, designed to deter harm to innocent passengers from terrorist attacks, mandated that the United States exercise a protective function in prohibiting United States travel to Lebanon in any form.

B. CZECHOSLOVAKIA AND THE USSR

United States actions' taken during the late 1970s and early 1980s against Eastern bloc countries must be evaluated in the context of the Cold War era. Nevertheless, in developing aviation relationships with Czechoslovakia, Poland, and the USSR, the United States assumed certain obligations under international law. These obligations were not always met in a manner that satisfied these trading partners or applicable principles of international law.

The United States ordered the closing of CSA's New York ticket office arose out of a dispute under the bilateral agreement, specifically, the inability of the U.S.-designated carrier, contrary to prior agreements, to accept Czech crowns as payment for travel and convert those crowns into dollars in Czechoslovakia. The retaliatory ac-

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[254] Chamberlain, *supra* note 196, at 615.

[255] *Id.* at 631.

[256] *Id.* U.S. law allows the President to suspend air transport rights of another country where it has been determined that the aviation trading partner has violated the Convention for the Suppression of Unlawful Seizure of Aircraft, 49 U.S.C. app. § 1514 (1988). Such a provision under domestic law does not in and of itself legitimate such an action under international law.

tion taken by the United States against CSA does not fit squarely into any of the legal frameworks outlined above. The bilateral agreement itself provided for the sale of tickets on a reciprocal basis. The Czechs, however, were not in a position to implement that portion of the bilateral agreement at the time it was signed. All parties to the agreement knew of the Czech position. What was unclear was what kind of position the Czechs would be in approximately two years later.

The Czechs ultimately contended that the U.S. carrier was afforded most favored nation treatment and that international law did not require anything other than that. But this argument would fall flat from the United States' perspective because one of the purposes of entering into a bilateral agreement is to be afforded better than most favored nation treatment — that is, to obtain national treatment. The United States could also legitimately argue that CSA was foolhardy to invest large sums of money into a New York ticket office, given its government's refusal to allow Pan Am to sell its tickets within Czechoslovakia for convertible crowns. CSA, then a State-owned airline, should perhaps have anticipated some form of retaliatory action by the United States.

Without knowing the negotiating history of this particular provision, it is difficult to evaluate the propriety of U.S. action under international law. For example, if the United States was aware that despite the language of the bilateral agreement the Czechs might well not be able at any proximate time to allow ticket sales by Pan Am in local currency, then the U.S. action against the CSA New York ticket office would appear precipitous, unfair, and legally questionable. The impression of unfairness is reinforced by the fact that the United States permitted both LOT and Aeroflot to sell their own tickets in the United States despite the fact that Pan Am could not sell its tickets for local currency convertible in either Poland or the USSR. Of course, the Czechs could have attempted invocation of the arbitration clause of the bilateral agreement following re-

ceipt of the order by the United States to close the New York ticket office. That action, however, could ultimately have moved the United States to the point where further extensions of the bilateral agreement would have been precluded.

The decision by the United States to order the closing of CSA's Chicago ticket office as a result of a diplomatic dispute unrelated to aviation presents a different type of situation. The U.S. response to the diplomatic affront was not vertically consistent because the precipitating dispute had nothing to do with the then existing bilateral aviation relationship between the two countries. Indeed, the action represented a case of retortion. The United States was not necessarily disgruntled over any violation of international law by the Czechs, let alone a violation of the aviation bilateral agreement. Rather, the United States was responding to an affront to one of its citizens, a member of its diplomatic community.

The Czech position here would likely be that this diplomatic flap had absolutely nothing to do with the operation of the country's international airline, much less whether that airline could continue to maintain a ticket office in Chicago, established under the auspices of a commercial treaty. But retortion by its very nature does not mandate a tit-for-tat response by the offended country. To the contrary, it is deemed to be more effective to the extent that the response is unpredictable and unforeseeable. CSA's argument would be stronger had it not been a State-owned carrier at the time. The fact that it was the embodiment of the Czechoslovak State lends some support to the U.S. actions — notwithstanding the total absence of any relationship. As was the case with the closing of the CSA New York ticket office, the Czechs could have sought arbitration — and undoubtedly jeopardized future extensions of the bilateral agreement.

The U.S. decision to order Aeroflot to reduce service to the United States in 1980 came after the Soviet invasion of Afghanistan. At that time, no bilateral agreement gov-

erning service existed, and Aeroflot was only flying to the United States under principles of reciprocity and comity. Moreover, while no U.S. interests were directly threatened by the Soviet invasion, the attack on Afghanistan represented a clear violation of the U.N. Charter and customary international law. Reduction in Aeroflot's air service to the United States and closer regulation of its charter activity were two of several retaliatory economic sanctions used by the United States against the Soviets at the time.

The aviation sanctions initiated against Aeroflot were not vertically consistent because the Soviet attack on Afghanistan was unrelated to the aviation sector. Once again, the United States was exercising a third state remedy under international law and using the aviation sector as the arrow for the bow. Since no bilateral agreement governed service at the time, the Soviets could not claim any violation of international law by the United States. As one commentator noted, article 41 of the U.N. Charter does not preclude "States either individually or collectively . . . from taking steps to interrupt air communication with a particular State . . . provided that the action they take is consistent with their other obligations under the Charter and under international law."[257]

The decision to take further action against Aeroflot, prompted by alleged Soviet complicity in the imposition of martial law in Poland, was likewise taken at a time when no bilateral air service provisions between the two countries were operable. No U.S. interests were directly threatened by the alleged Soviet activity. Moreover, despite President Reagan's claim that the Soviets bore "heavy and direct responsibility for the repression in Poland,"[258] it is not at all clear that the Soviets were guilty of any international law violations. The U.S. response of terminating Aeroflot's landing rights did not on its face con-

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[257] Chamberlain, *supra* note 196, at 629.

[258] Bialos & Juster, *supra* note 1, at 67.

stitute a violation of international law,[259] but was once again an example of the use of a vertically inconsistent economic sanction designed to achieve certain foreign policy objectives.[260]

Reaffirmance and expansion of sanctions against Aeroflot came following the shoot-down of Korean Airline Flight 007. Of the 269 persons who died over the Sea of Japan,[261] a number were U.S. nationals. While the South Koreans clearly had the most to complain about, the United States, unlike in the cases of Soviet moves in Afghanistan and actions related to Poland, was directly harmed by this unprecedented action. The USSR, a party to numerous multilateral treaties governing aviation navigation and safety, was widely condemned by the world community for a gross violation of international law. Use of retortion[262] by the United States in imposing vertically consistent additional sanctions against the Soviet's airline seemed entirely appropriate from a legal perspective.

C. POLAND

The more legally troubling instances of U.S. use of eco-

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[259] *But see* Paul A. Shneyer & Virginia Barta, *The Legality of the U.S. Economic Blockade of Cuba Under International Law*, 13 CASE W. RES. J. INT'L L. 451, 471 (1981) (noting that "there are numerous U.N. resolutions which indicate that the majority of nations consider the use of economic coercion illegal"). Indeed, there have been efforts within the U.N. to characterize economically coercive behavior as a violation of article 2(1) of the Charter. Article 41 of the U.N. Charter does, however, permit States to cut off air service to a country in conjunction with imposition of U.N. sanctions "provided that the action they take is consistent with their other obligations under the Charter and under international law." Chamberlain, *supra* note 196, at 629.

[260] Some observers suggest that one of the greatest advantages of the use of economic sanctions is the avoidance of armed conflict. *See* Moyer & Mabry, *supra* note 1, at 157; Bialos & Juster, *supra* note 1, at 847. Unfortunately, the U.S. has not attained the level of executive interdepartmental coordination of economic sanctions that attends military actions. *See* Robert Carswell, *The Need for Planning and Coordination of Economic Sanctions*, 19 N.Y.U. J. INT'L L. & POL. 857, 860-61 (1987); Bialos & Juster, *supra* note 1, at 847.

[261] Tracy A. Thomas, Note, *007 — Licensed to Limit Without Notice: The Case of Chan v. Korea Airlines, Inc.*, 13 LOY. L.A. INT'L & COMP. L.J. 95, 95 (1990).

[262] For a discussion of the concept of retortion, see ARIE E. DAVID, THE STRATEGY OF TREATY TERMINATION 257 (1975). Charney notes that the use of retortion is limited by international law. *See* Charney, *supra* note 234, at 59-60.

nomic sanctions, treaty bending, and treaty breaking appear in the cases of Poland and South Africa. With respect to Poland, service to the United States was actively being conducted by LOT under the terms of the United States-Polish bilateral agreement. Imposition of martial law in Poland did not threaten any U.S. interests directly and was, in and of itself, not a clear violation of international law. To the contrary, it was at least facially an internal Polish matter.[263] The United States accepted, and in some cases, supported other non-Soviet aligned regimes ruling in a similar manner. The response of the United States to imposition of martial law effectively eviscerated the terms of the bilateral agreement. The limited circumstances under which revocation of LOT's operating permit might be permissible under the agreement were certainly not met. The U.S. response, moreover, was vertically inconsistent with the harm allegedly being caused by the Polish government. Was the President's action a violation of international law?

The United States-Polish bilateral agreement was a treaty.[264] Under the Vienna Convention " 'treaty' is a generic term embracing any international agreement concluded between states in writing."[265] Since the United States views the Vienna Convention as a "primary source of reference for determining . . . customary principles of treaty law,"[266] it is at least a place to begin the analysis.[267]

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[263] As Charney notes, States are generally prohibited from interfering with the internal affairs of other States. Charney, *supra* note 234, at 60. This general proscription has, of course, been eroded, particularly in the human rights area. *See* Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1135 (1985).

[264] A treaty represents more than a contract because it "is practically the only device that the international community has at its disposal for conscious lawmaking and for deliberate establishment of legal relationships." Maria Frankowska, *The Vienna Convention On the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 288 (1988).

[265] *Id.* at 297.

[266] *Id.* at 298.

[267] There is some sentiment that U.S. courts have simply applied all aspects of the Vienna Convention as customary international law without "any discussion of whether the specific provisions accurately reflect customary law." *Id.* at 287.

Here the question is whether the United States violated a material term of the treaty and was consequently in breach. The answer is yes. The United States violated at least two material terms of the bilateral agreement. First, it suspended LOT's operating permit for reasons not contemplated by the agreement. Second, it failed to give the Polish carrier the requisite one year notice prior to termination of operating rights.

To be sure, the United States would undoubtedly contend that because it did not terminate the bilateral agreement, it had no duty to provide the one year notice of termination. Such a position is untenable given one of the major purposes of the one year notice provision, namely, to afford an air carrier adequate time to wind up its affairs. Nor is the United States' position acceptable under the Vienna Convention's mandate that requires treaty performance in "good faith." The distinction between denouncing the bilateral agreement and suspending the operating rights granted thereunder is one without a difference. The main purpose of an aviation bilateral agreement is to reciprocally exchange operating rights.[268] U.S. violation of international law in this case raises some additional (although now largely academic) issues.

Although the focus of this article is the legitimacy of the United States imposition of aviation sanctions from an international legal perspective, at least some discussion of the propriety of the President's actions against Poland under U.S. domestic law is appropriate given their questionable nature. Does the President, under domestic law, have the right acting alone to violate international law? This question brings us into a multi-dimensional debate that rages today in scholarly and political circles. Courts

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[268] As LOT's counsel points out, President Reagan *could* have simply announced that the soon-to-expire bilateral agreement would not be extended. Such a position would have achieved virtually the same practical effect without placing the United States in violation of international law. Interview with Robert Reed Gray, *supra* note 87.

have held that under certain circumstances, Congress together with the Executive can violate international law.[269] It is far less clear, however, that the Executive acting alone can do so.[270]

Those who suggest that the Executive alone cannot sanction violations of international law by the United States, will typically rely in part on the original intent of the founders that the "government's power was [to be] limited by treaties and by fundamental principles of international law."[271] Commentators also rely upon the text of the Constitution, including Article I, to support the notion that the Executive is duty bound to respect international law. Specifically, the Article I duty of the President to "take care that the laws be faithfully executed" has been interpreted to encompass treaties and international law.[272]

A separate but related debate in the scholarly literature concerns the role of the Executive and the two branches of Congress in the creation and termination of treaties and other international agreements — specifically, executive agreements.[273] Executive agreements "have essen-

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[269] Lobel, *supra* note 263, at 1972 n.7.

[270] *Id.* at 1121 ("The premise — that there is a unilateral executive power to terminate treaties — is far from established.").

[271] *Id.* at 1077.

[272] LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 55 (1992); *see also* Lobel, *supra* note 263, at 1125 (contending that the President's duty to uphold the laws is violated when the Executive causes a breach of treaty). Professor Lobel is emphatic about this obligation and he argues that violation of international law by the executive "should be presumptively invalid." *Id.* at 1115. Kenneth Randall identifies the related debate concerning interpretation of Article VI of the Constitution; some contend that because treaties are therein treated as the law of the land, they can only be terminated in the same way as other laws. Kenneth C. Randall, *The Treaty Power*, 51 OHIO ST. L.J. 1089, 1109-10 (1990). Others construe Article VI as merely addressing the superiority of federal over state law.

[273] This debate is likewise multi-dimensional. It includes the issue of whether executive agreements are legitimate as a method for concluding international agreements and, if so, under what circumstances. The debate also encompasses the respective roles of Congress and the Executive in particular substantive areas of law-making. For example, the division of constitutional power to regulate trade is, contends Professor Koh, ambiguous. Harold H. Koh, *Congressional Controls on Presidential Trade Policymaking, After* I.N.S. v. Chada, 18 N.Y.U. J. INT'L L. & POL. 1191, 1192 (1986). The Executive claims the power under the rubric of *United*

tially the same status under both international and domestic law as treaties."[274] Unlike treaties, however, executive agreements are not required to be approved by two-thirds of the Senate. The use of executive agreements has greatly expanded over the past century to the point where they represent the dominant form of international agreement for the United States.[275] There are at least two types of executive agreements: Presidential executive agreements — purportedly made solely by the Executive based upon its own constitutionally enumerated foreign affairs power[276] — and Congressional-executive agreements, made by the Executive based upon congressional delegation of authority.[277]

The Polish bilateral agreement was concluded as an executive agreement. Most commentators would agree that the power to conclude an international *aviation* agreement implicates the congressional power to regulate foreign commerce.[278] It seems reasonable to conclude then that the United States-Polish bilateral agreement has as its do-

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States v. Curtiss-Wright, 299 U.S. 304 (1936), while Congress claims the power under art. I, § 8, cl. 1, 3 of the Constitution. Trade agreements have been approved through Senate assent and Presidential ratification as well as through the less formal Congressional-Executive agreement format. Koh, *supra*, at 1201.

[274] David A. Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U. PA. L. REV. 1353, 1391 n.157 (1989).

[275] Jack S. Weiss, *The Approval of Arms Control Agreements as Congressional-Executive Agreements*, 38 UCLA L. REV. 1532, 1554-55 (1991).

[276] The creation of presidential executive agreements has been sanctioned under circumstances where the subject matter of the agreement falls exclusively within the constitutional power of the Executive. *See* United States v. Pink, 315 U.S. 203, 228-29 (1942) (stating that the power to conclude a presidential-executive agreement will be upheld by the courts where incident to recognition of another country); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 303 (1987); Randall, *supra* note 272, at 1092; Weiss, *supra* note 275, at 1546.

[277] Congress has, for example, delegated much of its Article I power to regulate commerce to the Executive. United States v. Yoshida Int'l, Inc., 526 F.2d 560, 571 (C.C.P.A. 1975); *see* Dames & Moore v. Regan, 453 U.S. 654, 1659 (1981) (suggesting that the President alone can conclude international agreements other than as treaties where he shares constitutional authority with the Congress and Congress demonstrates support for executive actions); Weiss, *supra* note 275, at 1548. *But see Yoshida*, 526 F.2d at 572 (stating that no undelegated power to regulate commerce rests with the President).

[278] *Cf.* Colonial Airlines, Inc. v. Adams, 87 F. Supp. 242, 243 (D.D.C. 1950)

mestic legal foundation a delegation of the foreign commerce power to the Executive,[279] thereby making it a form of congressional-executive agreement.

This brings us to the ultimate question with respect to U.S. domestic law and the Polish bilateral agreement: Can the President, acting *alone*, put the United States in breach of international legal obligations initially created as a *congressional-executive agreement* and "upset the legitimate expectations of the many parties who had arranged their business, commercial, or other affairs based upon certain assumptions that are subsequently undermined by . . . Presidential action?"[280]

The major stumbling block in answering this question appears to be the silence of the United States Constitution with respect to treaty termination, interpretation, and reinterpretation.[281] The practical reality is that the United States government has used a variety of methods to terminate treaties since the founding of the republic.[282] Whether those methods were legally proper is, of course, another question.

At least one scholar suggests a topical approach to the issue. He contends that where Article II gives the Executive exclusive authority over a particular topic, the President can make and break treaties and international agreements at will. Where, on the other hand, Article I

(holding that the power of the CAB to issue permits to foreign air carriers has been delegated to it by the Executive and Congress under the commerce power).

[279] The delegation of such authority is implicit in several statutes concerning aviation. *See, e.g.*, 49 U.S.C. app. § 1462 (1988) (requiring the Secretary of State to consult with other Executive departments "concerning the negotiations of any agreement with foreign governments for the establishment or development of . . . air routes and services"). The delegation is explicit in other statutes. *See, e.g.*, 49 U.S.C. app. § 1443 (1988) (stating that all aspects of issuance of foreign carrier air permits subject to Presidential approval).

[280] Christine Chinkin, *The Foreign Affairs Power of the U.S. President and the Iranian Hostages Agreement:* Dames and Moore v. Regan, 32 INT'L & COMP. L.Q. 600, 600 (1983).

[281] Louis Fisher, *Congressional Participation in the Treaty Process*, 137 U. PA. L. REV. 1511, 1511 (1989).

[282] Goldwater v. Carter, 617 F.2d 697, 706 n.18, 715 (D.C. Cir.), *vacated on other grounds*, 444 U.S. 996 (1979).

gives Congress authority or where Articles I and II give both the Congress and Executive authority, then the Congress must be involved in the termination or reinterpretation decision making process.[283] Congressional supremacists by and large reject such an approach, arguing, for example, that "[b]reaches of treaties for reasons not permitted under international law nor contemplated by the parties . . . are . . . presumptively suspect, and congressional approval is necessary to render the conduct lawful."[284]

Here, however, Congressional intentions with respect to U.S. duties under aviation bilateral agreements were seemingly clear at the time of the controversy with Poland. Section 1502 was enacted to preclude the CAB and later the DOT from violating international aviation agreements:

> In exercising and performing their powers and duties under this chapter, the Board and the Secretary of Transportation shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries . . . .[285]

In view of the Congressional mandate to the Executive to honor U.S. international aviation commitments, the unilateral decision by the Executive to suspend operation of

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[283] *See generally* Randall, *supra* note 272, at 1097. While the basis for Congressional power to occupy the field of international aviation may be found at least in part in the power to regulate foreign commerce, Executive power in this area is not so clear. *See, e.g.*, HENKIN, *supra* note 272, at 70 (stating that the commerce power "might be sufficient to support virtually any legislation that relates to foreign intercourse"). At least one court has suggested that one basis for apparent Presidential authority is derived from the Commander-in-Chief power. Specifically, Presidential deference is appropriate in the issuance of foreign air carrier permits on the basis of his access to confidential intelligence information not available to others. Trans World Airlines v. Civil Aviation Bd., 184 F.2d 66, 70 (2d Cir. 1950), *cert. denied*, 340 U.S. 941 (1951).

[284] Lobel, *supra* note 263, at 1128 n.286, 1130. Lobel contends that Congressional silence should be interpreted by the Executive to mean that the Congress desires the Executive to observe international law. *Id.* at 1120; *cf.* Giraudo, *supra* note 244, at 939 (noting that congressional power to regulate foreign commerce extends to the power to impose economic sanctions).

[285] 49 U.S.C. app. § 1502(a) (1988).

Poland's air service to the United States was highly suspect under domestic law.

D. SOUTH AFRICA

While Congress was largely shut out of the decision making process with respect to sanctions against Poland, it served as the instigator of actions taken later against South Africa. After years of discomfort with South Africa's maintenance of apartheid, Congress concluded that imposition of far-reaching economic sanctions might precipitate change. To be sure, the world community had concluded well before Congress acted that not only was the maintenance of a system of apartheid a violation of international law, but a violation of the most fundamental norms of international society, or *jus cogens*.[286]

Nevertheless, at the time U.S. sanctions against South Africa were being considered, no American interests were being directly threatened; a bilateral aviation agreement was in force; and the South African airline had been serving the United States for decades. And unless one accepts the eleventh hour claims made by Senator Sarbanes — that U.S. sanctions were justified because the government of South Africa was in breach of the bilateral agreement — the decision to impose aviation sanctions had little vertical relationship to the harms caused by apartheid in South Africa. Did the United States violate international law by precipitously suspending SAA's right to serve the United States?

Senator Sarbanes contended that suspension of the South African carrier's right to serve the United States would not put the United States in breach of the bilateral agreement because the South Africans had themselves al-

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[286] "Ordinary rules of international law are now distinguishable from the fundamental norms that permit . . . no derogation." Lobel, *supra* note 263, at 1136. As Professor Lobel explains: "*Jus cogens* status for a rule signifies that the world community is unwilling to permit either a nation or a group of nations unilaterally to seek changes in the norm. A *jus cogens* rule may be changed by multilateral international convention or other multinational forum or procedure." *Id.* at 1142 n.354.

ready breached the treaty through their unwillingness to allow certain black South African leaders to travel outside the country. In essence, the Sarbanes argument was an attack on an internal political system that had as its focus discriminatory behavior directed against a minority. But it was this very same political system with which the United States had negotiated a bilateral aviation relationship and, indeed, had expanded that relationship over the course of many years.

Article 31 of the Vienna Convention has been employed by U.S. courts to require "that in the interpretive process any subsequent practice in the application of the treaty . . . shall be taken into account."[287] In the case of the South African bilateral agreement, U.S. practice had been to virtually ignore the policies of the South African government related to travel and aviation in so far as those policies reaffirmed or perpetuated the apartheid system. Absent from the Sarbanes argument was any recognition of such United States complicity, making it doubtful that such a position would meet the good faith requirements imposed on treaty partners by the Vienna Convention.[288] Indeed, if Senator Sarbanes truly believed that the South Africans had materially breached the bilateral agreement, he could have offered an amendment to S. 2701 that would have immediately terminated the bilateral agreement in its entirety.[289]

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[287] Frankowska, *supra* note 264, at 341. "How — and for how long — have the parties operated under their original interpretation." Koplow, *supra* note 274, at 1423. As Professor Koplow points out, however, where the President and the Congress have given no particular or identifiable meaning to a particular portion of a treaty, "no legal standard is initially created, leaving greater scope for subsequent executive or judicial interstitial law-making." *Id.* at 1408. Arguably, the Vienna Convention, even had it been ratified by the United States, would not apply to the United States-South African bilateral agreement since the former was created after the latter. But "[i]f the Vienna Convention is viewed as a written statement of existing legal principles, its provisions are binding as customary norms and are inherently retroactive." Frankowska, *supra* note 264, at 292 n.46.

[288] *See* Lobel, *supra* note 263, at 1106 ("No inherent incompetence bars judicial consideration of whether Congress' asserted rationale for breaching a treaty is permissible under international law.").

[289] Under U.S. law, where one party violates a treaty, the non-breaching party

If one accepts the premise that the actions of Congress could cause a breach of treaty under international law, a logical question would be whether U.S. courts will allow such an event to occur where challenged. The answer is yes, but there is disagreement among commentators as to whether such judicial sanction is legitimate. It is generally accepted among courts that treaties and acts of Congress can "nullify" each other in effect domestically.[290] This means that while a court will always attempt to reconcile related statutes and treaties in purported conflict, a court's inability to do so will result in the one "last in time" controlling.[291] While courts generally try to avoid interpretation of a statute that will lead to a violation of international law,[292] statutes passed after treaty implementation, where in conflict with the treaty obligation, are domestically enforced as the law of the land.[293]

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has the option to declare the treaty null and void or to continue to honor it. Charlton v. Kelly, 229 U.S. 446, 473 (1912).

[290] HENKIN, *supra* note 272, at 33; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 (1987).

[291] The intention to abrogate or modify a treaty is not lightly imputed to Congress. Pigeon River Improvement Slide & Boom Co. v. Cox, 291 U.S. 137, 160 (1993). Courts, when faced with a conflict between language of a treaty and a statute, "presume that the two can be reconciled." Michael Gerber, *The Anti-Terrorism Act of 1987: Sabotaging the United Nations, and Holding the Constitution Hostage*, 65 N.Y.U. L. REV. 364, 374 (1990); *see also* Whitney v. Robertson, 124 U.S. 190, 194 (1887). Professor Paust proffers a unique and powerful argument that in a clash with a new statute, customary international law will prevail in the last in time battle because "custom is either constantly re-enacted through a process of recognition and behavior . . . or it loses its validity and force of law." Jordan J. Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exception to the Last in Time Rule and the Primacy of Custom*, 28 VA. J. INT'L L. 393, 418 (1988). For a discussion of the constitutionality of U.S. violations of customary international law, see, e.g., Michael J. Glennon, *Raising the Paquette Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321 (1986).

[292] Koplow, *supra* note 274, at 1390 n.153.

[293] Diggs v. Shultz, 470 F.2d 461, 466 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973). Although the standard for determining whether there is indeed a conflict is murky, at least one commentator suggests that there must be some "affirmative expression of congressional intent to supersede an earlier treaty or clear evidence that Congress actually considered the conflict . . . and then chose to resolve that conflict by abrogating the earlier treaty." Gerber, *supra* note 291, at 375. Such a standard seems logical to impose since a repeal by implication is only appropriate where the two statutes are irreconcilable. Morton v. Mancari, 417 U.S. 535, 548

There exists some sentiment in scholarly circles that the last in time rule is inappropriate. One commentator points out that despite current thinking, the Republic's founders believed that treaties were superior to pre-existing and subsequent federal statutes.[294] "Even Republican advocates of congressional power agreed that subsequent legislation could supersede treaties only for reasons permitted under . . . international law . . . ."[295] This same commentator laments the fact that congressional power to supersede treaties became "firmly established in American jurisprudence" only in the last 100 years.[296] In any event, it appears that for better or worse, the last in time doctrine has been adopted as a jurisprudential rule in the United States. This means that U.S. courts, when legitimating congressional enactments that conflict with pre-existing treaties, may very well be perpetuating violations of international law.

But even if the United States could not legally justify suspending SAA's landing rights by resort to the Sarbanes position, the United States was arguably *not* in violation of international law by imposing aviation sanctions against South Africa. The suspension of SAA's landing rights could be viewed as an exercise of a third state remedy under international law: We were not directly effected by a human rights violation, but nevertheless chose to express our dissatisfaction with apartheid through economic sanctions.[297] Does international law permit exercise of a third state remedy through methods that would otherwise

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(1974). In the case of a treaty approved by the Senate, additional issues must be considered since "[o]nce Congress passes an inconsistent act, a new question arises: which exercise of express constitutional power prevails, the treaty (by the Senate and President) or the legislation (by the House, Senate and President)." Paust, *supra* note 291, at 402 n.12. Even where a court finds a later enacted statute conflicts with a treaty obligation, the U.S., under international law, is still under an obligation to perform under the treaty. Gerber, *supra* note 291, at 374.

[294] Lobel, *supra* note 263, at 1096.

[295] *Id.* at 1099.

[296] *Id.* at 1103.

[297] Support for use of third state remedies in cases of human rights violations can, for example, be found in the ILC Draft Report of 1976. Charney, *supra* note 234, at 57. Charney correctly points out that human rights protections are unen-

be considered themselves to be a breach of treaty and consequently a violation of international law? The answer is perhaps, and only then under the most limited of circumstances.

The ICJ's opinion in *In re Barcelona Traction, Light, & Power Co.*[298] is instructive as a starting point. There the court in dictum suggested that certain obligations are owed by States to the entire international community and that the international community has a legal interest in their protection.[299] These duties include those imposed by *jus cogens* and should be enforceable by third States that are not directly harmed by violations.[300] The notion is that *jus cogens* rules constitute a lowest common denominator below which states cannot sink. These few but essential fundamental rules constitute a universal bill of rights — albeit a limited one — where enforcement, by necessity, is left to the world community.

At the time that Congress considered sanctions against South Africa, apartheid had been classified internationally as a criminal act.[301] Congress would seemingly have been on firmer legal ground terminating SAA's service by relying upon its duty under international law to halt the crime of apartheid and uphold principles of *jus cogens* — even when this meant breaching a long-standing bilateral treaty.[302] Indeed, Congress could have done the investi-

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forceable without the use of third state remedies. *Id.* at 13. He cautions, however, that such enforcement may have to be predicated on a multilateral treaty. *Id.*

[298] *In re* Barcelona Traction, Light, & Power Co., 1970 I.C.J. 4, 32 (Judgment of Feb. 5).

[299] *See* Charney, *supra* note 234.

[300] *See* Lobel, *supra* note 263, at 1145 n.371 ("[A]ll nations have a legal interest in imposing sanctions against a state that violates *jus cogens* rules, not just the directly injured state, if any."). Apartheid is considered to be a violation of *jus cogens*. LAURIE HANNIKANINA, PREEMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW 286 (1988).

[301] Goler T. Butcher, *The Unique Nature of Sanctions Against South Africa, and Resulting Economic Issues*, 19 N.Y.U. J. INT'L L. & POL. 821, 823 (1987). Lobel points out that the 1973 International Convention on Suppression and Punishment of the Crime of Apartheid, as its title suggests, criminalized apartheid. Lobel, *supra* note 263, at 1143 n.362.

[302] *See* Lobel, *supra* note 263, at 1109 ("[S]ome significant differences may now exist between breaches of bilateral treaty obligations and violations of other cus-

gation and analysis that the CAB, fourteen years earlier, had been unwilling to do: determining how the policies and practices of SAA in employment and passenger treatment within the confines of South Africa reflected the criminal system of apartheid. Had Congress premised actions against South Africa upon *jus cogens*, eleventh hour justifications such as those offered by Senator Sarbanes would have been unnecessary. Furthermore, United States imposition of sanctions would have been considered bolder and more legally justifiable.

CONCLUSION

Generally, when the United States imposes economic sanctions, established contractual and other international relationships are jeopardized as private suppliers of goods and services suddenly learn that transactions with buyers, both government and private, are constrained or prohibited. Aviation sanctions likewise interfere with these private contractual relationships. Aviation sanctions have been used to alter existing treaty relationships between governments whose airlines substantially depend on those contractual arrangements to organize and conduct their affairs. Aviation bilateral agreements cement relations, provide predictability, and allow long-term planning in an industry designed to bring people together. The United States undermines the primacy of international law and the underlying purposes of aviation bilateral agreements when it acts in contravention of those agreements in the absence of substantial legal cause. This is not to imply that the United States should abandon use of aviation sanctions altogether. Rather, it is meant to suggest that we devalue the effectiveness and legitimacy of aviation

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tomary international norms. Certain international norms, which are often contained in multilateral treaties, now appear qualitatively more important than the general obligation to honor treaties."). Butcher argues that articles of the U.N. Charter create obligations on the part of States to take unilateral actions to end apartheid. Butcher, *supra* note 301, at 830-31.

sanctions as a foreign and legal policy tool with overuse or abuse.

The United States must develop a more coherent framework for determining the appropriateness of various forms of aviation sanctions. That framework should allow policymakers to assess both the nature of the offense being sanctioned and the type of sanction most appropriate to employ. The answers to the following questions will assist in the formulation of appropriate U.S. responses:

1. Are U.S. interests directly threatened by the acts of another country or will the United States employ a third state remedy? The more the acts threaten U.S. interests directly — making them closer to the "core" of offensiveness — the more justifiable will be a U.S. sanction. Likewise, where the acts threaten a third country directly, but the United States only tangentially, the acts are in the "penumbra" of offensiveness, making U.S. sanctions less justifiable.[303]

2. Were the offensive acts taken within the domestic confines of a country under the country's laws? Were the effects of the actions manifested elsewhere? With the latter, we are closer to a core violation; with the former, we are closer to the penumbra.

3. Were the offensive acts a violation of international law? If so, were they a violation of *jus cogens*, a multilateral, customary international law, or a bilateral agreement? Core violations encompass these categories. The penumbra would include foreign governmental actions that are otherwise distasteful to the United States.

4. Were the offensive acts aviation or non-aviation related? Core violations include the former. The penumbra is the latter for the purposes of imposing sanctions related to aviation.

5. Will the contemplated U.S. sanctions undermine an

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[303] The notions of "core" and "penumbra" are articulated in WILLARD VAN ORMAN QUINE, TWO DEGREES OF EMPIRICISM, *reprinted in* LAW, LANGUAGE AND ETHICS: AN INTRODUCTION TO LAW AND LEGAL METHOD 326 (William R. Bishin & Christopher D. Stone eds., 1972).

existing bilateral aviation relationship? To the extent they will, they are in the penumbra of acceptability; to the extent they will not, the sanctions are in the core of acceptability.

6. If the offensive acts constitute a violation of international law, what practical multilateral remedies exist to correct the violation?[304] Where such remedies do exist, imposition of unilateral sanctions is in the penumbra of acceptability; to the extent such remedies do not exist, unilateral sanctions are closer to the core of acceptability.

7. Will use of sanctions harm the wrong people?[305] In the case of aviation, for example, will the sanctions be directed at a government or privately-owned airline? Actions targeting a government-owned airline will be closer to the core of acceptability than those targeting an otherwise guiltless private carrier.

8. Will the United States violate international law by undertaking the contemplated sanction? To the extent it will, the sanction is in the penumbra of acceptability.

The framework outlined is by no means exhaustive. It merely suggests that certain issues should be considered by legal and policy decision makers when contemplating sanctions. To the extent that the United States addresses these issues prior to employing future sanctions in the aviation sector, the country should benefit by the insights offered by history and at the same time advance the rule of international law.

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[304] Some of the practical advantages of reliance upon multilateral sanctions include: 1) achieving more significant economic impact where most or all suppliers enforce sanctions; 2) avoiding imposition of an unfair economic impact where nearly all suppliers adopt sanctions; 3) avoiding divisions among otherwise friendly nations; and 4) avoiding thorny extraterritoriality issues potentially raised by imposition of unilateral sanctions. Moyer & Mabry, *supra* note 1, at 158-60.

[305] At least one commentator contends that U.S. sanctions against Poland in 1981 hurt the Polish people more than their government. Fourie, *supra* note 2, at 922.

by legal and policy decision makers when contemplating sanctions. To the extent that the United States addresses these issues prior to employing future sanctions in the aviation sector, the country should benefit by the insights offered by history and at the same time advance the rule of international law.